STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

Defendant-Appellant.

UNPUBLISHED
August 6, 2009

No. 281580
Lenawee Circuit Court
LC No. 06-012287-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

Defendant-Appellant.

No. 281581
Lenawee Circuit Court
LC No. 06-012288-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

Defendant-Appellant.

No. 281582
Lenawee Circuit Court
LC No. 06-012289-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

No. 281583
Lenawee Circuit Court
LC No. 06-012292-FC

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

No. 281584
Lenawee Circuit Court
LC No. 06-012293-FC

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

No. 281585
Lenawee Circuit Court
LC No. 06-012294-FC

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY MICHAEL OMEY,

No. 281586
Lenawee Circuit Court
LC No. 06-012295-FC

Defendant-Appellant.

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant in seven separate files of eight total counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim younger than 13) and (b)(ii) (related victim between ages 13 and 16), and eight counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim younger than 13) and (b)(ii) (related victim between ages 13 and 16). The trial court sentenced defendant to concurrent prison terms of 96 to 540 months for one CSC I conviction, 180 to 540 months for four of the CSC I convictions, and

225 to 675 months for the other three CSC I convictions. The court also imposed concurrent prison terms of 36 to 180 months for one CSC II conviction, 71 to 180 months for two of the CSC II convictions, and 86 to 180 months for the remaining five CSC II convictions. Defendant appeals by delayed leave granted. We affirm in part, reverse in part, and remand.

Defendant's convictions arise from his repeated sexual assaults of two daughters, MO and CO. The prosecutor charged defendant with committing several sexual offenses against MO during different periods between April 2001 and September 2004, and with sexually assaulting CO in November or December 1998.

I. Adequacy of Informations and Jury Instructions

Defendant first contends that the multiple informations against him, the verdict form, and the trial court's jury instructions all qualified as impermissibly vague and confusing in identifying the charged offenses. Defendant specifically maintains that the documents and instructions failed to adequately differentiate between the conduct charged in each count, and thus required the jury to speculate regarding what evidence or testimony supported each charge. Because defendant failed to object to the informations, the verdict form, or the jury instructions, we review these unpreserved issues only to determine whether defendant can demonstrate a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

A prosecutor should craft an indictment "in language that will fairly appraise the accused . . . of the offense charged," and must list the date "as near as may be." MCL 767.45(1)(a), (b). An approximate date may suffice, depending on the nature of the crime charged, the victim's ability to specify a date, the prosecutor's efforts to pinpoint a date, and the prejudice to a defendant in preparing a defense. *People v Sabin*, 223 Mich App 530, 532; 566 NW2d 677 (1997). "In criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element." *Id*. After reviewing the seven felony informations prepared by the prosecutor in these cases, we observe that they describe the nature of defendant's alleged conduct, and all pinpoint the commission dates or time periods with reasonable specificity, especially given that all the charges in these cases involve minor child victims and repeated instances of sexual abuse. We thus conclude that informations contained sufficient specificity to notify defendant of the conduct charged.

The jury verdict form tracks the language of the informations for each charge submitted to the jury.[1] For each charged offense, the verdict form identified the victim, the nature of the unlawful conduct charged, and the period in which the offense allegedly took place, thereby helping the jury differentiate among the various charges. And contrary to defendant's argument, the offense descriptions in the verdict form correlated with the victims' trial testimony discussing

[1] In LC No. 06-012288-FC, the dates contained in the information were changed in the verdict form to conform with the victim's testimony, with defense counsel's consent.

defendant's various sexual assaults.[2] Thus, the jury need not have speculated with respect to what evidence or testimony was associated with each charge.

The trial court's jury instructions set forth the elements of CSC I and CSC II, including the applicable variables. Defendant does not complain that the instructions contained substantive errors. Rather, he asserts that they failed to differentiate between the multiple charges in the different lower court files. However, the instructions referred the jury to the verdict form for this information and, as previously discussed, the verdict form adequately differentiated between the various charges. Viewed as a whole, the jury instructions thus fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

In summary, defendant has failed to establish any error, plain or otherwise, arising from the informations, the verdict form, or the trial court's jury instructions. Therefore, we also find no merit in defendant's related argument that defense counsel was ineffective for failing to raise these issues at trial. Counsel need not raise a meritless objection.[3] *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

II. Sufficiency of Evidence

Defendant next avers that insufficient evidence supported his CSC II convictions because the victims' testimony described only acts of sexual penetration punishable as CSC I. We review the sufficiency of the evidence de novo by considering the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find every element of the charged crime proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. at 400.

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[2] We find it plain that the charge and verdict form for LC No. 06-012295-FC related to the testimony that defendant sexually assaulted CO near Thanksgiving or Christmas in 1998; the charge and verdict form for LC No. 06-012289-FC related to the first described incident of molestation and digital penetration against MO; the charge and verdict form for LC No. 06-012293-FC related to the first incident of intercourse described by MO; the charges and verdict form for LC No. 06-012288-FC related to MO's testimony concerning two acts of intercourse on the kitchen table; the charge and verdict form for LC No. 06-012287-FC related to MO's testimony concerning an act of intercourse during a visit after she moved out of defendant's house; the charge and verdict form for LC No. 06-012292-FC related to MO's testimony concerning an act of intercourse when she stayed with defendant because of her stepfather's surgery; and the charge and verdict form for LC No. 06-012294-FC related to the last described act of intercourse against MO, just before the abuse was reported to authorities.

[3] Additionally, as the prosecutor notes, ineffective assistance of counsel is not properly before the Court because defendant did not raise this issue in his applications for delayed leave to appeal, and this Court granted the applications limited to the issues raised therein. MCR 7.205(D)(4).

The prosecutor charged defendant with multiple counts of CSC II, pursuant to the following statutory provisions in MCL 750.520c:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in *sexual contact* with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> * * *
>
> (ii) The actor is related by blood or affinity to the fourth degree to the victim. [Emphasis added.]

"Sexual contact" means "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for" revenge, to inflict humiliation, or out of anger. MCL 750.520a(q).

In LC No. 06-012289-FC, the prosecutor charged that between April 2001 and June 2001, defendant committed one count of CSC I, digital-vaginal penetration, against MO, and two counts of CSC II, summarized in the information as "sexual contact with" MO. These charges tracked the trial testimony of MO, born in December 1989, that the first assault she recalled by defendant involved his fondling of her vagina followed by his penetration of her vagina with his finger.

In LC No. 06-012293-FC, the prosecutor also charged that between April 2001 and June 2001, defendant penetrated MO's vagina with his penis (CSC I), and a second count of CSC II on the basis of defendant's "sexual contact with . . . [MO]." The prosecutor apparently grounded these charges on MO's recollection that "soon after" defendant's initial sexual assault, the "[s]ame thing happened," culminating in defendant's penile penetration of MO's vagina on a bed.

In LC No. 06-012288-FC, the information alleged that between May 2002 and June 2002, defendant committed against MO two counts of CSC I and one count of CSC II. This information related to MO's trial description that the next molestation episode by defendant that stood out in MO's mind took place when, "I think I was 12." The 2002 sexual assault by defendant occurred in a different setting, "when he put [MO] on the edge of the table and started having intercourse," eventually penetrating her vagina with his penis a second time.

With respect to the adequacy of proof supporting the four CSC II counts in LC Nos. 06-012289-FC, 06-012293-FC and 06-012288-FC, MO related at trial that the first assault by defendant incorporated his contact with or fondling of her vagina and his digital penetration of her vagina, all as he played a pornographic movie. "[S]oon after" the first molestation, MO

recalled that defendant ordered her into a bedroom and penetrated her vagina with his penis while on a bed. When MO offered that she next remembered the tabletop penetration that occurred during the next year when she "was 12," the following exchange took place:

> *Prosecutor*: Okay. So it would've been a whole year.
>
> *MO*: Yes.
>
> *Prosecutor*: Okay, did these things continue to happen between 11 and 12?
>
> *MO*: Yes.
>
> *Prosecutor*: How often?
>
> *MO*: Like three to four—three to four times—
>
> *Prosecutor*: Was it always—
>
> *MO*: —a week.
>
> * * *
>
> Three to four times a week.
>
> *Prosecutor*: Okay, was it always the same?
>
> *MO*: Pretty much, except for the table.

Near the conclusion of MO's direct examination, the prosecutor summarized that MO only remembered details from certain of the charged events. In explanation, the prosecutor inquired, "Is this pretty much something that once it started it happened on a regular basis[,]" and MO replied, "Yes."

MO's trial testimony detailed one specific incident of vaginal fondling. But viewing MO's testimony in the light most favorable to the prosecutor, and indulging every reasonable inference in support of the jury's verdict, her testimony substantiates a rational inference that three or four times a week throughout the period she was 11 and 12 years of age, "these things," specifically defendant's fondling of her vagina, penetration of her vagina, or both, routinely took place. Viewing MO's trial testimony in this light, the jury rationally could have found beyond a reasonable doubt that, on at least four occasions when MO was between the ages of 11 and 12, defendant's ongoing molestations of MO included the vaginal fondling she described at trial. In summary, the jury reasonably could have found beyond a reasonable doubt that defendant had unlawful sexual contact with MO's vagina, as charged in the four CSC II counts in LC Nos. 06-012289-FC, 06-012293-FC and 06-012288-FC.

Regarding the remainder of the CSC II counts, MO recalled that she moved out of defendant's home and began residing with her mother in Dearborn sometime before the school year began in 2002. With respect to the sexual assaults that took place when MO subsequently

visited her brother at defendant's home, MO described only that she and defendant had "sexual intercourse," which MO repeatedly defined at trial as consisting of defendant's penetration of her vagina with his penis. With respect to CO, she similarly testified that sexual assaults by defendant became routine, but only detailed one incident in which defendant penetrated her vagina with his penis. The record thus simply contains no evidentiary basis for any of the four instances of unlawful sexual contact charged as CSC II in LC Nos. 06-012287-FC (January 2003-October 2004 against MO), 06-012292-FC (August 2004 against MO), 06-012294-FC (September 2002 against MO), and 06-012295-FC (November 1998 or December 1998 against CO).

Contrary to the prosecutor's contention that CSC II necessarily occurs anytime a defendant commits CSC I, controlling precedent of our Supreme Court instructs otherwise. In *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997), the Michigan Supreme Court explained,

> CSC I requires the prosecutor to prove "sexual penetration." MCL 750.520b(1) . . . . CSC II requires the prosecutor to prove "sexual contact." MCL 750.520c(1) . . . . Sexual penetration can be for any purpose. MCL 750.520a(1) . . . . The statute defines sexual contact, however, as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k) . . . . Thus, *because CSC II requires proof of an intent not required by CSC I—that defendant intended to seek sexual arousal or gratification—CSC II is a cognate lesser offense of CSC I. In short, it is possible to commit CSC I without first having committed CSC II*. [*Id*. (emphasis added)]

Several Michigan Supreme Court justices recently expressed a willingness to reconsider whether CSC II constitutes a cognate lesser offense of CSC I. See *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007).[4] But *Lemons* remains controlling precedent for purposes of our analysis.

In conclusion, we affirm defendant's four CSC II convictions in LC Nos. 06-012289-FC, 06-012293-FC and 06-012288-FC. But we vacate defendant's four CSC II convictions in LC Nos. 06-012287-FC, 06-012292-FC, 06-012294-FC, and 06-012295-FC because they lacked any evidentiary foundation.

III. Double Jeopardy

[4] Justices Young and Weaver, concurring in part and dissenting in part, and Justice Corrigan, dissenting, opined that CSC II is a necessarily included lesser offense of CSC I. *Id*. at 143, 154, 161-165, 178. Justices Taylor and Markman disagreed. *Id*. at 117-118, 134-137. Justices Cavanagh and Kelly did not reach the issue. *Id*. at 142-143. Unlike this case, in which defendant stood trial on numerous, separate charges of CSC I and CSC II, the prosecutor charged the defendant in *Nyx* with several counts of CSC I only, and the Supreme Court in *Nyx* analyzed whether "a defendant charged with an offense consisting of various degrees may . . , consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree." *Id*. at 115 (opinion by Taylor, C.J.).

Defendant next argues that even if the evidence adequately supported his guilt of both CSC I and CSC II in some of the informations, his dual convictions violate the double jeopardy protections against multiple punishments for the same offense, US Const, Am V; Const 1963, art 1, § 15. Whether double jeopardy applies is a legal question that we review de novo. *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008). But because defendant failed to raise this double jeopardy issue in the trial court, we review it only for plain error affecting his substantial rights. *Carines*, *supra* at 763.

In addition to protecting a defendant against multiple prosecutions for the same offense, the constitutional double jeopardy provisions protect a defendant from multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). In this context, double jeopardy protects a defendant from enduring more punishment than the Legislature intended. *Id*. at 316. In *Smith*, our Supreme Court held that the *Blockburger*[5] test is the appropriate test for determining whether double jeopardy precludes multiple punishments. *Id*. at 296. Under the *Blockburger* same-elements test, multiple punishments for violations of different statutes are permitted if each offense contains an element that the other does not, such that they do not constitute the same offense. *Id*. at 296, 300-301, 314-316.

As previously discussed in part II, *supra*, with respect to defendant's four CSC II convictions in LC Nos. 06-012289-FC, 06-012293-FC and 06-012288-FC, MO's testimony supported a finding that defendant committed discrete acts of sexual contact, independent of his acts of penetration. Thus, regardless whether CSC II constitutes a cognate or necessarily included lesser offense of CSC I, no double jeopardy violation arises from these CSC II convictions because they do rest on the same acts of penetration that formed the basis of the CSC I convictions in those informations.[6]

IV. Joinder and Admissibility of Other Acts Evidence

Defendant next complains that the trial court erred in denying his request to sever the trial of the charge involving CO from the trial of the remaining charges involving MO. Defendant also argues that the trial court erred in allowing the jury to consider evidence of the offense against CO in the trial of the charges involving MO.

A. Severance

[5] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

[6] In light of our decision to vacate defendant's remaining four CSC II convictions for lack of evidentiary support, we need not consider defendant's double jeopardy claim with respect to these charges. Moreover, according to *Lemons*, *supra* at 253-254, CSC II is a cognate lesser offense of CSC I. A cognate lesser offense contains some elements in common with the greater offense, but also has one or more elements not found in the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). Given that CSC I and CSC II each contain an element that the other crime does not, defendant's dual convictions of both CSC I and CSC II, even if premised on a single sexual act, would not have violated double jeopardy principles.

"To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *People v Williams*, ___ Mich ___; ___ NW2d ___ (Docket No. 135271, decided July 9, 2009), slip op at 5. "The court's ultimate ruling on a motion to sever is reviewed for an abuse of discretion" *People v Girard*, 269 Mich App 15, 17; NW2d (2005). "An abuse of discretion occurs when the trial court's ruling falls outside the range of "reasonable and principled outcomes." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

According to MCR 6.120(C), "On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1)." The referenced subrule, MCR 6.120(B)(1), sets forth the following:

> Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

In the present case, all charged offenses shared the connections that the victims were defendant's daughters, and all the charged acts reasonably can be viewed as "parts of a single scheme or plan" by defendant to engage in ongoing acts of sexual intercourse with his daughters. Consequently, the trial court did not clearly err to the extent it found that the offenses were sufficiently related to warrant joinder. We recognize that MCR 6.120(B) contemplates that a court "may" sever related offenses, at its discretion, "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." However, given the many acts of intercourse described by MO, and the related testimony of both CO and MO that they discussed MO's revelations of her abuse by defendant, we discern no enhanced fairness to defendant adequate to warrant the trial court's severance of the single charge involving CO. In summary, because defendant endured minimal prejudice arising from the joinder of all charges concerning both CO and MO, the trial court did not abuse its discretion in denying his motion for severance.

B. Other Acts

In deciding whether to admit evidence of other acts under MRE 404(b)(1), a trial court must first decide whether the prosecutor has offered the evidence for a proper purpose (i.e., one other than to show the defendant's propensity to act in conformity with a given character trait); second, if the evidence has relevance to an issue of fact of consequence at trial; third, whether any danger of unfair prejudice substantially outweighs its probative value, in light of the availability of other means of proof; and fourth, whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). "That the prosecution has identified a permissible theory of admissibility and the defendant has entered a general denial, however, does not automatically render the other acts evidence relevant in a particular case." *Id*. at 60. The trial court still must find that the evidence qualifies as material

(i.e., related to a fact "at issue" "in the sense that it is within the range of litigated matters in controversy"), and that it has probative force (i.e., "any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence"). *Id*. at 56-57, 60 (internal quotation omitted).

Where, as here, defendant's theory of the case is that the charged incidents never occurred, "evidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin, supra* at 62. Evidence of sufficiently similar prior acts can be used "to establish a definite prior design or system which included the doing of the act charged as part of its consummation." *Id*. at 63-64 (internal quotation omitted). "[T]he result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed." *Id*. at 64 (internal quotation omitted). "General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme or system used to commit the acts." *Id*. at 64. There must be "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id*. at 64-65 (internal quotation and emphasis omitted). A high degree of similarity must exist—more "than that needed to prove intent, but less than that needed to prove identity"—but the plan itself need not be unusual or distinctive. *Id*. at 65-66.

Both victims here were defendant's daughters, and both victims testified that defendant engaged in sexual intercourse with them, the assaults occurred when defendant was alone with the victims, the assaults became a matter of routine, and defendant warned the victims not to tell anyone. On this record, sufficient similarities existed to give rise to reasonable inferences that defendant employed a system, scheme, or pattern of sexual abuse against his daughters and that the charged acts against MO more probably than not occurred. We conclude the trial court did not abuse its discretion in allowing the jury to consider evidence of the offense against CO in the trial of the charges involving MO.

V. Volunteered Testimony

Defendant next asserts that testimony disclosing that he committed an uncharged sexual act with another daughter deprived him of a fair trial and violated his constitutional right of confrontation. Because defendant raised no objection at trial to the challenged testimony, we review this issue for plain error affecting his substantial rights. *Carines, supra* at 763.

At trial, a doctor volunteered the allegedly improper remark during his recitation of MO's medical history. The doctor recounted having received information that MO and "also two of her other sisters had had sex with their father." Although the doctor was repeating what someone else had told him outside of court, the statement was not "offered in evidence to prove the truth of the matter asserted," for example, to prove that defendant had intercourse with another daughter. MRE 801(c). Therefore, the statement does not come within the definition of hearsay. Similarly, because the prosecutor did not solicit the doctor's remark for its truth, the prosecutor did not offer it as evidence of other acts under MRE 404(b)(1), and its elicitation did not violate defendant's constitutional right of confrontation. See *Crawford v Washington*, 541 US 36, 51-56, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (a testimonial statement of a witness absent from trial is not *admissible for its truth* unless the declarant is unavailable and the defendant has had a prior opportunity for adequate cross-examination). Furthermore,

considering the brief and isolated nature of the statement, and that the prosecutor made no effort to follow up on or highlight the reference, or to refer to it during closing arguments, the comment's injection did not affect defendant's substantial rights.

With respect to defendant's related suggestion that defense counsel was ineffective for failing to object to the doctor's remark, this issue is neither properly before this Court[7] nor possessing of any merit. Defendant has failed to overcome the strong presumption that defense counsel declined to object to the isolated statement to avoid drawing attention to it, as a matter of sound trial strategy. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994).

VI. Sentencing

Defendant lastly challenges the trial court's imposition of CSC I sentences between 225 and 675 months in LC No. 06-012288-FC and LC No. 06-012293-FC. Defendant specifically contests the trial court's scoring of 25 points under offense variable (OV) 11 and 50 points under OV 13 of the sentencing guidelines.

Our review of the records in these cases reveals that defendant waived any claims that the trial court misscored OV's 11 and 13. At the sentencing hearing, the following relevant colloquy ensued:

> *The Court*: The probation agent has computed the minimum sentence guideline range, [defense counsel], in these various cases. Have you that [sic] the opportunity to see each of those computations?
>
> *Defense counsel*: I have, Your Honor. I have gone over those thoroughly.
>
> *The Court*: Do you agree with each of those computations?
>
> *Defense counsel*: Yes, I do find those to be accurate.

Counsel's affirmative expression of satisfaction with the scoring of the guidelines amounts to a waiver, which extinguishes any error relating to the sentencing guidelines. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Furthermore, the trial court sentenced defendant within the statutory guidelines range, and defendant has failed to challenge the trial court's scoring decisions at sentencing or in an appropriate postsentencing motion, which renders any appellate complaint unreviewable. MCL 769.34(10); MCR 6.429(C); see also *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004) (holding that "if 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").

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[7] See footnote 3, *supra*.

Defendant also seeks to secure appellate review of the scoring guidelines by casting his claims in terms of ineffective assistance of counsel, an issue beyond the scope of the orders granting leave to appeal in these cases. We will briefly address the claims, both of which lack merit. When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); see also *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

A. OV 11

We initially observe that defendant incorrectly asserts that the trial court scored 25 points for OV 11 in both LC No. 06-012288-FC and LC No. 06-012293-FC. The sentencing information reports reveal that the trial court assigned OV 11 25 points in LC No. 06-012288-FC, but not in LC No. 06-012293-FC. In the latter file, the court scored no points for OV 11.

In MCL 777.41(2)(a), our Legislature instructed sentencing courts to score points for the number of sexual penetrations "arising out of the sentencing offense." A sentencing court may "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)(c). This Court has explained that only the penetration that forms the basis for the sentencing offense should be excluded pursuant to MCL 777.41(2)(c). *People v Cox*, 268 Mich App 440, 456; 709 NW2d 152 (2005); *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003). Under of OV 11, "trial courts are prohibited from assigning points for the one penetration that forms the basis of a first- or third-degree CSC offense that constitutes the sentencing offense, but are directed to score points for penetrations that did not form the basis of the sentencing offense," irrespective whether they resulted in separate convictions. *McLaughlin*, *supra* at 676; see also *Cox*, *supra* at 455-456. In LC No. 06-012288-FC, the jury convicted defendant of two counts of CSC I for engaging in two separate acts of sexual penetration during a single criminal offense. Consequently, for each offense scored, the trial court properly assigned 25 points for one additional sexual penetration.

B. OV 13

Defendant further challenges the trial court's 50-point scores for OV 13 in both LC No. 06-012288-FC and LC No. 06-012293-FC. Under MCL 777.43(1)(a), a court must score 50 points for OV 13 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." The statute additionally provides that in calculating the appropriate number of points under this variable, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). As defendant correctly observes, "[e]xcept for offenses related to membership in an organized criminal group," which this case does not involve, a court cannot in OV 13 "score conduct scored in offense variable 11 or 12." MCL 777.43(2)(c). This language means that in LC No. 06-012288-FC, the second penetration used to support the 25-point score for OV 11 cannot be used to score OV 13. But even without considering that penetration, ample support exists for the trial court's 50-point score of OV 13 in both files.

With respect to the scoring of OV 13 in LC No. 06-012288-FC, in addition to the sentencing offense, defendant was convicted of separate acts of sexual penetration against a

person less than 13 years of age in LC No. 06-012289-FC and LC No. 06-012293-FC. Similarly, in addition to the sentencing offense in LC No. 06-012293-FC, defendant was convicted of separate acts of sexual penetration against a person younger than 13 in LC No. 06-012288-FC and LC No. 06-012289-FC. These multiple convictions establish that defendant engaged in "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). Therefore, we find that the trial court correctly scored 50 points for OV 13 in both files.

Because the trial court correctly scored OV 11 and OV 13, defendant's claim that his counsel was ineffective for failing to object to these scoring decisions is groundless. *Kulpinski*, *supra* at 27.

VII. Conclusion

We affirm all eight of defendant's CSC I convictions and sentences. We also affirm defendant's four CSC II convictions and sentences arising from LC Nos. 06-012289-FC, 06-012293-FC and 06-012288-FC, but vacate the four CSC II convictions related to LC Nos. 06-012287-FC, 06-012292-FC, 06-012294-FC, and 06-012295-FC. We remand for correction of the judgments of sentence in conformity with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly