STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2009
v	No. 278247 Cass Circuit Court
JOSHUA WRAY WILLIAMS, Defendant-Appellant.	LC No. 06-010273-FC

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b. He was sentenced to 14 to 30 years' imprisonment for each CSC I conviction, to be served concurrently. We affirm.

On appeal, defendant first contests the admission of other bad-acts evidence, raising several claims of error. With the exception of defendant's claim that the probative value of the evidence did not outweigh its prejudicial effect, defendant failed to raise his other arguments in the trial court, and they are therefore unpreserved. *People v Aldrich,* 246 Mich App 101, 113; 631 NW2d 67 (2001). We review the trial court's decision to admit evidence for an abuse of discretion. *People v Johnson,* 474 Mich 96, 99; 712 NW2d 703 (2006). The trial court abuses its discretion when its decision falls outside a range of principled outcomes. *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003). Defendant's unpreserved constitutional challenges are reviewed for plain error affecting his substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court determined that the other-acts evidence was admissible pursuant to MCL 768.27a, which provides that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." "MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)." *People v Pattison,* 276 Mich App 613, 618-619; 741 NW2d 558 (2007). It "allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." *Id.* at 620. Propensity evidence admitted pursuant to MCL 768.27a is relevant: "our cases have never suggested that a defendant's criminal history and propensity for committing a particular type of crime is irrelevant to a similar

charge. On the contrary, it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation to juries." *Id.* The challenged evidence in this case was clearly relevant under MCL 768.27a, and the trial court did not abuse its discretion in admitting it where it was not excludable under MRE 403. As decided by the trial court, the probative value of the other-acts evidence was not outweighed by the danger of unfair prejudice.[1] Relevant evidence may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. The focus of the inquiry behind MRE 403 is whether the evidence was unfairly prejudicial, because the prosecution's evidence is most likely always prejudicial to some extent. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). In *Pattison, supra* at 621, this Court warned trial courts "to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence."

The challenged other-acts evidence was more than marginally probative to rebut defendant's general denial that he was responsible for the charged offense. Defendant took advantage of another young victim when she was entrusted to his care as the baby-sitter, when other adults and children were not present and he was alone with the victim in a private location. The uncharged incident was highly probative to show that defendant engaged in sexually inappropriate behavior with a young child when opportunity presented itself. Although the testimony regarding the uncharged act was somewhat prejudicial, it was not graphic or inflammatory. *Pickens, supra*. The determination of the balancing test under MRE 403 is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony." *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). We find that the trial court's decision did not fall outside the range of reasonable and principled decisions. *Babcock, supra* at 269.

In reaching our conclusion, we find meritless defendant's contentions that MCL 768.27a is unconstitutional because it impermissibly infringes on the Supreme Court's power to establish rules regarding court procedure, violates the ex post facto clause, and conflicts with MRE 404(b). This Court decided these issues in *Pattison, supra* at 613; 741 NW2d 558 (2007), and *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2008). We are bound by prior published Court of Appeals decisions "issued on or after November 1, 1990 that have not been reversed or modified by the Supreme Court." MCR 7.215(J)(1). In *Pattison, supra* at 619, this Court held that MCL 768.27a was "a substantive rule of evidence because it does not principally regulate the operation or administration of the courts" and did not violate the separation of powers. In addition, we also held that MCL 768.27a does not violate the ex post facto clause because it does not lower the value of the evidence or the amount of proof necessary for a conviction.[2] *Id.* Further, in *Watkins, supra* at 363-364, this Court held MCL 768.27a controls

[1] Defendant argues that the trial court failed to follow the five-factor "test" set forth in *United States v Guardia*, 135 F3d 1326, 1331 (CA 10, 1998). However, the courts of this state have not adopted the factors discussed in that case.

[2] Defendant briefly argues that *Pattison* was wrongly decided and a conflict panel should be
(continued…)

over MRE 404(b) to the extent that the two conflict because the statute addresses an area of substantive law.[3]

Defendant also asserts that MCL 768.27a violates his equal protection rights. US Const, Am XIV, § 1; Const 1963, art 1, § 2. The rational basis test applies in determining whether a statute violates equal protection guarantees, unless the discrimination alleged involves a suspect class or a fundamental right. *People v Martinez,* 211 Mich App 147, 150; 535 NW2d 236 (1995). Under a rational basis analysis, the statute is presumed constitutional, and defendant bears the burden of showing that it is arbitrary and not rationally related to a legitimate government interest. *Id*. Defendant cannot meet the burden of proof.

A rational basis exists supporting a legitimate government interest in enacting statutes or evidentiary rules imposing different standards for criminal sexual conduct, i.e., the difficulty in prosecuting these crimes, the higher rate of recidivism, and problems in underreporting. In *People v Cooper (After Remand),* 220 Mich App 368, 374; 559 NW2d 90 (1996), this Court held that MCL 28.243(9), which provided that once a defendant is acquitted, fingerprint cards could be returned unless the charged crime involved criminal sexual conduct against a minor, did not violate equal protection because CSC offenses were often underreported, difficult to prosecute, and involved higher rates of recidivism. *Id. Cooper* also noted that "under certain circumstances, evidence of prior sexual assaults that have resulted in acquittal may be admissible as prior bad acts evidence in subsequent sexual assault prosecutions under MRE 404(b). . . . This is another fact that justifies the refusal to return arrest records to persons acquitted of sex crimes." *Id.* at 375. This Court further noted that

> criminal sexual conduct offenses are more difficult to prosecute than other serious crimes because they are generally committed under a shroud of secrecy, leaving the victim as the only significant witness to the offense. . . . Because of these unique characteristics, the state has a legitimate interest in implementing a criminal identification and record system to facilitate law enforcement investigation and prosecution of criminal sexual conduct offenses. [*Id.* at 374.]

(…continued)

convened. MCR 7.215(J)(2). Defendant argues that this case is similar to *Carmell v Texas,* 529 US 513; 120 S Ct 1620; 146 L Ed 2d 577 (2000). However, MCL 768.27a does not lower the amount of evidence necessary to convict defendant, unlike in *Carmell, supra* at 544-545; rather, it merely removes existing restrictions to previously inadmissible evidence. *Pattison, supra* at 619. Other than disagreeing with this Court's analysis in *Pattison,* and offering the distinguishable case of *Carmell,* defendant fails to explain how *Pattison* was wrongly decided and provide a basis upon which to convene a conflict panel.

[3] Unlike in *Watkins, supra* at 364-365, the trial court here did not hold that there was a conflict between MRE 404(b) and MCL 768.27a in that the evidence was inadmissible under MRE 404(b) but admissible under MCL 768.27a. Moreover, defendant does not present an alternative analysis under MRE 404(b) on appeal. A defendant "may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Further, this Court held that MCL 768.27a

> reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords. Naturally, a full and complete picture of a defendant's history will tend to shed light on the likelihood that a given crime was committed. [*Pattison, supra* at 620.]

This policy behind MCL 768.27a, that the jury should be able to view a defendant's conduct at issue in the larger context of his history of conduct, was again recognized in *Watkins, supra* at 365. Defendant has failed to overcome the presumption that MCL 768.27a is constitutional because it is rationally related to the legitimate governmental interests.

Defendant also argues that the trial court erroneously relied on *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973), in admitting the challenged evidence. We agree. However, we note that the trial court did not rely on *DerMartzex* in admitting the challenged evidence; it merely noted that, "by way of background," the other-acts evidence was helpful in placing the charged offense in context and "would also support the admission" of the other-acts evidence. The trial court's ruling had also considered the admissibility of the evidence under MRE 404(b).[4]

Defendant next argues that the trial court's limiting instruction was improper. The record reflects that the trial court issued the standard jury instruction pertaining to MCL 768.27a evidence instead of an instruction relating to MRE 404(b) evidence. Defendant never requested the omitted instruction, and he indicated that he approved of the instructions as given. This issue is unpreserved and reviewed only for manifest injustice. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). The trial court is not obligated to give an instruction sua sponte, *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999), and no authority supports that defendant was entitled to the instruction he now requests because the evidence was admitted pursuant to MCL 768.27a. Pursuant to *VanderVliet, supra* at 74-75, even where other-acts evidence is admitted under MRE 404(b), a limiting instruction may be provided *upon request*. See also MRE 105. Defendant has failed to show that the trial court's instructions resulted in manifest injustice because the trial court properly instructed the jury pursuant to the instruction related to MCL 768.27a evidence, and defendant failed to show that he was entitled to the omitted instruction or that he even requested it.

Defendant next claims error regarding the admission into evidence of the DVD recording of his interview with Trooper Felix Ambris. However, at trial, defendant indicated that he had "no objection" to the admission of the DVD into evidence or playing the DVD for the jury. A defendant may not waive objection regarding an issue during trial and then subsequently raise it as an error on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Waiver extinguishes any error because the party's affirmation intentionally relinquishes or abandons a

[4] Defendant briefly asserts that the other-acts evidence was not admissible to show a common scheme or plan under MRE 404(b), but he fails to provide any authority or further analysis, as noted, *supra.* We find it unnecessary to engage in such an analysis.

known right. *Id.* at 215-216. Nevertheless, in the context of defendant's claim of ineffective assistance of counsel, we address the claimed errors *infra.*

Defendant next alleges that the trial court's jury instructions were deficient because they did not require the jury to unanimously agree that two penetrations occurred in order to find defendant guilty of the two counts of CSC I, and that he was entitled to an instruction on unanimity. Defendant did not request a specific unanimity instruction, and he approved of the instructions as given; thus, that allegation of error is not preserved. *People v Fletcher*, 260 Mich App 531, 557; 679 NW2d 127 (2004) (to preserve an error in the failure to give jury instructions, a party must make a request on the record). Defendant's claim is reviewed for manifest injustice; manifest injustice is present where the instructional error is so great that it constitutes plain error that affected defendant's substantial rights. *Carines, supra* at 763; *People v Torres (On Remand),* 222 Mich App 411, 423; 564 NW2d 149 (1997).

Defendant is entitled to a unanimous verdict, and the trial court has an obligation to properly instruct the jury regarding the unanimity requirement. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994); US Const, Am VI; Const 1963, art 1, § 14. Usually, when the prosecution presents evidence of alternative acts "as evidence of the actus reus element of the charged offense," the general instruction on unanimity will suffice, "unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Id.* at 524. Defendant has not demonstrated plain error requiring reversal. The record reflects that the trial court properly instructed the jury that defendant was charged with two counts of sexual penetration, vaginal and anal, that these were separate crimes, and that the jury "must consider each crime separately," and that the verdict must be unanimous. The trial court's instructions were not erroneous, and a specific unanimity instruction was not warranted because the prosecution did not present "alternative acts" evidence regarding the actus reus of one charged crime. Cf. *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992), and *Cooks, supra* at 505-506, 528-529. Rather, there were actually two different charged acts, anal and vaginal penetration, and evidence regarding those two separate instances of penetration (one involving anal penetration and one involving vaginal penetration) was presented to the jury. *Cooks, supra* at 524. Moreover, the trial court gave the general unanimity instruction, CJI2d 3.11(3), and it instructed the jury pursuant to CJI2d 3.20, informing it that defendant was charged with two counts, and they were separate crimes that must be considered separately.

Defendant also argues that his conviction for CSC I involving anal penetration was not supported by sufficient evidence. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). We are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Sexual penetration is an element of first-degree criminal sexual conduct. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997); MCL 750.520b. The penetration may be

for any purpose, not merely sexual gratification. *Id.* Pursuant to MCL 750.520a(r), "[s]exual penetration" is defined in relevant part as "anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." "Any penetration, no matter how slight, is sufficient to satisfy the 'penetration' element . . . ." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

We conclude that there was sufficient evidence to enable a rational trier of fact to find, beyond a reasonable doubt, that anal penetration occurred, however slight. Although the victim did not specifically testify at trial that defendant penetrated her anally, she was three years of age at the time of the incident, and several years passed between that time and trial. She nonetheless testified that something "bad" occurred in 2000 that scared her and that defendant did it. She recounted incidents where defendant put ice in her diaper and held her head underwater. In addition, the testimony of Dr. Kerry Gear, who treated the victim at the hospital after the incident giving rise to the charges, established that, in addition to the victim's extensive bruising over her body and vaginal area, there was also bruising on her buttocks and *within* her gluteal cleft, the area in between the buttocks near the anal opening. Such bruising "is not bruising that would occur without the cheeks being spread or something being placed inside." Gear testified that there were scraping injuries or excoriations on the victim's rectum, and that this was not caused by a flat, direct blow, but by "[s]omething that had to cause shearing forces or scraping on the skin." Gear opined that the victim "had received some sort of sexual trauma or sexual activities." The testimony of the doctor who examined the victim a few days later, Donna Harrison, also indicated that the victim's buttocks were bruised and there was a laceration on the victim's rectum "near the rectal's sphincter area," that was swollen and red. Given the area of anatomy at issue here, we conclude that the jury could reasonably infer from the evidence that the victim was anally penetrated based on the fact that the bruising and laceration injuries to her rectum and gluteal cleft were caused by her buttocks being "spread" apart and "something being placed inside" that "cause[d] shearing forces or scraping on the skin." *Nowack, supra* at 400.

Defendant next alleges that the prosecution committed misconduct. We review defendant's unpreserved allegations for plain error that affected defendant's substantial rights; defendant's claim is precluded unless an objection and curative instruction would have failed to cure the error, or a miscarriage of justice would result if this Court refused to review the issue. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant first alleges that the prosecution committed misconduct by offering hearsay evidence through Ambris's rebuttal testimony. Defendant abandoned this claim because he failed to cite authority for his assertion that Ambris's testimony actually constituted inadmissible hearsay. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, hearsay is defined as "an oral or written assertion . . . other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801. Hearsay is inadmissible unless otherwise provided by the rules of evidence. MRE 802. Ambris's rebuttal testimony was not admitted for its truth. It was not hearsay. Rather, the challenged testimony, that the victim was placed in foster care after the incident, was admitted to impeach defendant's testimony that he saw the victim after the incident. Further, the evidence that the victim was taken into protective custody after the incident was already admitted via other witnesses' testimony. Thus, even if erroneously

admitted, it was not prejudicial because it is cumulative of other evidence already admitted. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

We also find no error in defendant's assertion that the prosecution made an improper burden-shifting and civic-duty argument during closing. The prosecution argued in rebuttal that the jury could "if you want reward this defendant for raping a three-year-old, for choosing a three-year-old victim, somebody who can't remember, somebody who's not able to point him out even though two other adults couldn't even point him out because he looks different, punish her for her inability to recognize him from seven years ago, punish her for her being three, and reward him for choosing a three-year-old when the evidence tells you that he did it, and you make that decision." The prosecution did not state that defendant had to prove anything. His argument rebutted defense counsel's arguments related to the fact that the victim failed to identify defendant at trial or testify that any sexual abuse occurred. The prosecution may argue that a witness is or is not worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecution was essentially arguing that the jury should not discount the victim, given her age at the relevant time. *Id.* The prosecution also may permissibly respond to the defendant's theory at trial. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Further, the record does not reflect that the prosecution asked the jury to convict defendant out of civic-duty. It did not inject issues broader than defendant's guilt or innocence into the case or encourage the jurors to suspend their powers of judgment. *Thomas, supra* at 455-456. Defendant also fails to prove that any error could not have been cured by an objection and curative instruction. *Callon, supra*.

Defendant next alleges that the prosecution unnecessarily charged aggravating factors with the two counts of CSC I. The prosecution has broad discretion with respect to filing criminal charges. *People v Goold*, 241 Mich App 333, 342; 615 NW2d 794 (2000). In *Goold, supra* at 341-342, this Court held that the defendant could permissibly be charged with third-degree criminal sexual conduct, MCL 750.520d(1), but under alternative theories (affinity and force and coercion). The prosecution may list the aggravating factors provided in the statute that accompany a CSC I charge. *People v Johnson*, 406 Mich 320, 331 n 3; 279 NW2d 534 (1979). We conclude that the prosecution did not abuse its discretion in charging defendant by alleging three alternative theories under which he could be found liable of CSC I. The prosecution charged that the victim was "under age 13, or defendant effected sexual penetration through force or coercion and said victim sustained personal injury, or defendant had a reason to know said victim was physically helpless or mentally incapacitated or mentally incapable and said victim sustained personal injury."

We further hold that defendant's argument that the prosecutor's cumulative errors deprived him of a fair trial is meritless because we have found no misconduct by the prosecution, and only actual errors are used in assessing their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Defendant next raises an ineffective assistance of counsel argument regarding defense counsel's failure to object to the admission of the DVD or request limiting instructions, failure to object to the trial court's unanimity instruction, and failure to object to the prosecutor's alleged misconduct. A defendant's right to counsel, guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, includes the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d

674 (1984). Review of these matters is limited to the record available because no *Ginther*[5] hearing took place related to these issues. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To prevail on a claim on ineffective assistance of counsel, defendant is required to show that trial counsel's performance was objectively unreasonable, and that he suffered prejudice as a result, in that there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's errors. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *Strickland, supra* at 687-688.

Because the jury instructions regarding the two counts of CSC I and the unanimity instruction were not erroneous, defense counsel was not ineffective for failing to object to the trial court's instructions. Defense counsel is not ineffective for failing to advocate a meritless position. *Snider, supra* at 425. Similarly, because the prosecutor did not engage in misconduct, defense counsel was not ineffective for failing to object to any alleged misconduct. *Id.*

In addition, after reviewing the record and the DVD, we conclude that defendant was not deprived of the effective assistance of counsel with respect to his handling of the DVD. First, we note that defendant claims error regarding counsel's failure to object to Ambris's statements in the DVD interview that the victim was in counseling and was afraid of defendant. Defendant abandons this issue because he failed to provide analysis and supporting authority. *Kelly, supra* at 640-641. Second, the record reflects that Ambris's statements to defendant during the interview regarding the nature of the victim's accusations against defendant were not admitted for their truth. Thus, the challenged statements were not hearsay and an objection on that ground would have been meritless. *Snider, supra* at 425 (Defense counsel is not ineffective for failing to advocate a meritless position). Out-of-court statements may be used for purposes besides establishing the truth of the matter asserted. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). For example, the statement is admissible when offered to show its effect on the hearer. *Id.* at 11. See also *People v Johnson*, 100 Mich App 594, 599; 300 NW2d 332 (1980) (An officer's comments on a tape-recorded statement of defendant, that summarized the victim's allegations against the defendant, were not inadmissible hearsay because they were "offered to put the defendant's statements in the appropriate context, not to prove the truth of the matter asserted therein.") In the case at bar, the statements were offered to provide a context for defendant's reaction and statements after he was told of the allegations. The record reflects that the prosecution did not subsequently use or mention Ambris's questions to defendant; they were not treated as evidence like defendant's responses. The prosecution used the DVD evidence to elicit the fact that defendant reacted in a surprised and shocked way when he was showed the photographs of the victim and informed that there were sexual abuse allegations, that defendant agreed that the victim could not have been injured by falling on a couch, that he was alone with the victim at some point, that defendant acknowledged that the evidence indicated that "all roads led to him," and that defendant indicated during the interview that he remembered the night of the incident, although he claimed at trial that he did not.

Similarly, Ambris's statement to defendant on the DVD, that the victim's statements were consistent, did not constitute an inadmissible prior consistent statement. Prior consistent

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

statements are not hearsay and are admissible where the declarant testifies at trial and is subject to cross-examination, and the statements were made in response to a charge of recent fabrication. MRE 801(d)(1)(B). Ambris's statement, however, was not offered as evidence at trial to show that the victim's allegations were consistent or to rebut a charge that the victim was fabricating the incident. *Johnson, supra*.[6] The statements were not offered as an exception to the hearsay rule, but were offered to place defendant's statements in context and to show his responses and reactions. *Id.* Moreover, Ambris's inquiry of defendant that mentioned that the victim must be telling the truth because she did not know the concept of lying at that age did not constitute improper vouching by a witness of another witness's credibility. *People v Buckey,* 424 Mich 1, 17; 378 NW2d 432 (1985). Similar to defendant's previous allegations, Ambris was not asked at trial whether he believed the victim was telling the truth. He was not questioned regarding his statements and questions to defendant about whether the victim was lying or knew how to lie, and he did not offer an opinion regarding the victim's credibility; in fact, he was only questioned at trial regarding defendant's responses during the interview. It is undisputed that defendant's statements on the DVD were admissible, and that Ambris's statements and questions were necessary to set the context for defendant's party admission. The DVD was admitted into evidence to show defendant's statements and reactions, not Ambris's questions to defendant or as evidence. No successful objection could have been made. *Snider, supra.*

Defendant also argues that other bad-acts evidence was improperly admitted via the DVD interview. During the interview, defendant denied the victim's allegations and asked why the victim's sister did not also raise any allegations against him, and Ambris then told him that the victim's sister's examination also showed signs of penetration. There is no further reference by either Ambris or defendant to any allegations involving the sister. We decline to find error requiring reversal in this case. Defendant has failed to establish that there is a reasonable probability that, even if defense counsel objected or had the DVD redacted, the result of the trial would have been different, given the other evidence implicating defendant and the fact that Ambris's statement was only a brief statement that was never otherwise referred to or discussed at trial. *People v Hoag,* 460 Mich 1, 5-6; 594 NW2d 57 (1999). Defendant has also failed to overcome the presumption that defense counsel chose not to object to this reference in the DVD in order to avoid drawing the jury's attention to it. *Id*. This Court will otherwise "not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Further regarding the DVD, Ambris specifically admitted before the jury that during an interview he would make misrepresentations of fact. Police officers are allowed to make misrepresentations during police interrogations. As the United States Supreme Court held,

> "confessions remain a proper element in law enforcement." . . . [*Miranda v Arizona*, 384 US 436, 478; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Therefore, p]loys to mislead a suspect or to lull him into a false security that do not rise to

[6] We note that defendant denied that the victim's allegations were true, and both the victim and Ambris testified at trial and were available for cross-examination.

the level of compulsion or coercion to speak are not within *Miranda's* concerns. [*Illinois v Perkins*, 496 US 292, 297; 110 S Ct 2394; 110 L Ed 2d 2394 (1990).]

However, a prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). In the present case, the prosecutor corrected any false evidence related to the DVD when Ambris admitted before the jury that he makes misrepresentations during interviews. These admissions eliminated the prejudicial quality of the statements. The officer's admissions informed the jury that his statements on the DVD were not definitive conclusions or declarations of fact.

Defendant next claims that Ambris's reference to a polygraph test in the DVD was inadmissible, and defense counsel failed to object or exclude this information. On remand, the trial court conducted an evidentiary hearing where it was determined that a redacted version of the DVD that omitted the reference to a polygraph examination was shown to the jury. Therefore, defendant's claim is without merit.

Defendant claims that trial counsel was ineffective for failing to request any limiting instructions regarding the DVD. We find that defense counsel was not ineffective for failing to request any limiting instructions. Defense counsel used the DVD to defendant's advantage in arguing that defendant denied the allegations even when Ambris left the interview room, and Ambris admitted that he misrepresents facts during investigatory interviews. Defendant has failed to overcome the presumption that defense counsel's actions constituted sound trial strategy; defense counsel could have chosen not to request any instructions because he did not want to draw further attention to any of Ambris's statements. *Hoag*, *supra* at 5-6.

Lastly, defendant argues that the trial court abused its discretion in denying defendant's motion for a new trial premised on its finding, after a *Ginther* hearing, that defendant was not deprived of the effective assistance of counsel where defense counsel failed to present an alternative defense; specifically presenting expert testimony to discredit that the victim was penetrated at all. Following a *Ginther* hearing, the trial court "must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *LeBlanc*, *supra* at 579. The trial court's findings of fact are reviewed for clear error, and constitutional issues are reviewed de novo. *Id.*

Defense counsel's performance is presumed effective, and his decisions are presumed to constitute reasonable and sound trial strategy decisions. *Davis*, *supra* at 368. While "[f]ailure to make a reasonable investigation can constitute ineffective assistance of counsel," *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), defense counsel's decision not to present an expert witness is presumed to be a matter of sound trial strategy, and defendant must show that he was deprived of a substantial defense to overcome that presumption. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Further, contrary to defendant's assertion, the trial court is permitted to assess the credibility of witnesses presented at a *Ginther* hearing, and we defer to the trial court's determination. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), modified 481 Mich 1201 (2008); MCR 2.613(C).

After thoroughly reviewing the record evidence presented at the *Ginther* hearing, including the testimony of defendant's retained expert, Lawrence W. Schappa, and defendant's trial counsel, we conclude that the trial court did not err in finding that defendant was not deprived of the effective assistance of counsel. The record reflects that defense counsel did not hire a medical expert or investigate whether the victim was actually penetrated. But, he engaged in a reasonable investigation of defendant's case, and as a result of that investigation and his professional judgment and experience, he chose to pursue the defense that defendant was not responsible for the sexual abuse and other individuals had access to the victim, including her mother, her father and her uncle. Defense counsel received the medical reports and photographs from the victim's examinations. He reviewed these photographs with one of the treating physicians and questioned her about the photographs and her findings, and decided that he would argue that the abuse could have occurred at a different time with a different perpetrator. Defense counsel also interviewed the victim's family members and met with defendant several times. Although the treating physician changed her testimony at trial and narrowed the possible timeline within which the abuse could have occurred, defense counsel got her to admit that she had changed what she initially told him during their interview. Defense counsel testified that in his experience, it is more effective to present one strong defense rather than multiple defenses because the jury may become skeptical. Defense counsel further testified that attempting to discredit a victim's injuries and credibility and argue that there was no penetration could potentially backfire and damage defendant's case. The graphic photographs of the young victim showed extensive bruising and other injuries to her eyes, neck, limbs, torso and genital region. The trial court referred to the victim's injuries in the photographs as "the true nature of which words cannot adequately describe." Therefore, pursuing the defense that someone else was responsible for the sexual assault was "a reasonable decision that [made] particular investigations [into disputing medical testimony] unnecessary." *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Giving defense counsel's decision "a heavy measure of deference" in light of all the circumstances, defense counsel's decision to argue that someone else was responsible for the assault was reasonable. *Id.* We note that even strategic decisions that are made after an incomplete investigation can nonetheless be reasonable if, in defense counsel's professional judgment, such a decision is warranted. We defer to defense counsel's reasonable strategic decision to pursue the chosen defense and not consult another expert regarding the penetration element. *Id.* Although the strategy failed, this does not render his performance deficient. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also failed to establish that presenting the requested defense and expert would have changed the outcome of the trial. It is questionable whether the jury would have credited defendant's expert's testimony over the examining physicians' testimony. Schappa's examination occurred years after the incident, and was limited to the photographs of the victim and the examining physicians' reports. On the other hand, Harrison and Gear had the opportunity to actually physically examine the victim shortly after the incident. Moreover, although defense counsel is required to carry out an independent investigation of the facts, *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004), Harrison and Gear were not prosecutorial experts who were paid to examine the victim and then testify at trial, but were the medical personnel who happened to be working on the day the victim was brought in for examination. Additionally, Schappa's testimony reveals that even when showed photographs of the genitalia of sexually abused girls, he did not believe that those photographs differed greatly

from the photographs of non-abused girls. Given the extensive and graphic external injuries suffered by the victim, it is doubtful that in a "battle of experts" the jury would have sided with the defense expert. Further, Schappa conceded that although he did not find that the vaginal or anal injuries were "diagnostic" or "specific" for penetration, it was possible that the injuries were consistent with sexual abuse, and strong circumstantial evidence in the case at bar indicated that the victim was penetrated and defendant was responsible for the charged offenses.

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra