STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2010
v	No. 290009 Isabella Circuit Court
ROBERT SHANE HORTON, Defendant-Appellant.	LC No. 08-000903-FC

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

I. Introduction

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b[1] and one count of accosting a child for immoral purposes, MCL 750.145a. He was sentenced to concurrent prison terms of 18 to 40 years for his CSC convictions and a consecutive term of 23 to 48 months for his accosting a child for immoral purposes conviction.[2] We affirm.

II. Background

While this case arises out of the ubiquitous allegations of sexual abuse of a minor by a friend of the victim's family, the circumstances of the nearly year long sexual abuse of the 13 year old victim by defendant in this case are unique. In October 2006, defendant became the victim's martial arts teacher at the request of the victim's mother to counteract bullying the

[1] Defendant was charged with CSC I under the alternate theories of MCL 750.520b(1)(b)(iii) (sexual penetration with a child between 13 and 16 by a person in a position of authority) and MCL 750.520b(1)(e) (actor armed with a weapon).

[2] Defendant was previously charged in Montcalm County with and pleaded guilty to CSC III, MCL 750.520d(1)(a) (sexual penetration with a victim between 13 and 16 years of age), for which he was sentenced to a 3 to 15 year prison term. Although that conviction involved the same victim as the instant case, it is not part of this appeal.

victim was experiencing at school. The victim described defendant as a big brother, teacher, and role model and testified that her relationship with defendant went far beyond a teacher-student relationship as the victim would periodically spend the night at defendant's house, accompany defendant on hunting outings, travel on overnight trips with defendant and his wife, and clean defendant's house for extra money. Defendant even disciplined the victim in front of her parents after the martial arts training began.

Not long after training commenced, in April 2007, defendant offered the victim alcohol while she was at his home and invited the victim into his bedroom to watch him masturbate and perform fellatio on him. The victim complied. Shortly thereafter, defendant informed the victim that he was a member of an "illegal organization" involved in prostitution, drugs, and weapons and invited the victim to join as a fighter or a dancer whereupon she could earn $50,000. Unbeknownst to the victim, no such "organization" existed. Frustrated with her mother and wanting to earn extra money, the victim underwent defendant's interview process, which involved her dancing and stripping in front of defendant before performing oral sex and masturbating on defendant's bed. Defendant videotaped all of these actions ostensibly as part of the interview.

Although the victim pleaded to leave the "organization" soon after joining, defendant threatened that if the victim left without completing certain "objectives," he would kill and rape the victim's family, sister, and friends. The objectives included carrying a substance the victim believed to be methamphetamines, takings pictures of fellow female classmates, and most importantly having sexual intercourse with defendant 500 times. The number of times the victim was required to have sex with defendant varied depending on whether she upset defendant. Defendant would relay these objectives by personally telling the victim that "Kevin" – the leader of the "organization" – had ordered their completion or by acting as "Kevin" and calling the victim on her cellular phone. Like the "organization," "Kevin" was also one of defendant's machinations. To disguise his identity when acting as "Kevin" on the phone, defendant utilized a voice changer making him sound like Darth Vader. The victim believed defendant and "Kevin" were two different persons, and although she told defendant she wanted out of the organization and to stop having sex with him, she was "deathly afraid" of "Kevin." The victim estimated that from April 2007 through April 2008, she engaged in sexual intercourse with defendant 63 times at various locations, in addition to numerous instances of oral sex. The victim noted that defendant always carried a gun or had it within arm's reach during sexual activity.

On April 9, 2008, the victim's mother overheard a strange voice talking to the victim on the phone, and after the victim informed her mother about the sexual abuse and "Kevin," the victim and her mother went to the police. It was not until discussing the incident with police that the victim realized defendant and "Kevin" were the same person. The victim later called defendant and recorded several subsequent telephone conversations with defendant acting as both himself and "Kevin." Defendant was arrested and convicted of CSC III, MCL 750.520d(1)(a) (sexual penetration with a victim between 13 and 16 years of age), in Mountcalm County pursuant to a plea agreement. It was after this that an Isabella County jury found defendant guilty of the offenses underlying this appeal.

III. Defendant's arguments on appeal

A. Sufficiency of the evidence

Defendant first claims the evidence was insufficient to support his CSC convictions. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

Defendant was convicted of CSC I under alternate theories. The first theory under MCL 750.520b(1)(b)(iii) requires proof that defendant engaged in sexual penetration with a person between the ages of 13 and 16 and that defendant was "in a position of authority over the victim and used this authority to coerce the victim to submit." The second theory under MCL 750.520b(1)(e) requires proof that defendant engaged in sexual penetration with a person and was "armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon." Defendant challenges the first theory on the grounds that the evidence did not show that he coerced the victim to submit let alone that he was in a position of authority. He challenges the second theory on the grounds that he was not "armed" with a gun within the meaning of the statute. Both arguments fail.

First, there is abundant evidence that defendant was in a position of authority over the victim. Indeed, in the victim's own words, defendant was a "big brother," "role model," "instructor," and "teacher" and his behavior was sometimes "controlling" in reaction to her interaction with other eighth-grade boys. Furthermore, not only did defendant serve as the victim's martial arts instructor, discipline the victim, employ the victim to clean his house every other week, and take the victim – at age 13 – on hunting and overnight trips, but defendant also "interviewed" the victim to become a part of his "illegal organization" and required the victim under the guise of an alternate identity known as "Kevin" to carry out "objectives" that would increase or decrease arbitrarily at defendant's whim. In light of the victim's history with defendant, as well as her contact with defendant acting as "Kevin," the victim's entire experience was defendant exercising his authority over her.

Having achieved his status of authority over the victim, defendant routinely used this authority for the nearly exclusive purpose of coercing the victim to submit to both oral and vaginal intercourse. Initially, defendant required the victim, as part of the "organization" interview process, to dance, strip, perform fellatio, and then masturbate on his bed. At this time, defendant instituted the "seven minute rule," which required the victim to make defendant ejaculate within seven minutes. Once in the "organization," defendant – sometimes acting as himself and sometimes acting as "Kevin" – assigned the victim "objectives" as requirements for her to leave the "organization," which included having intercourse with him 500 times, a number that the victim indicated varied depending on whether she had upset defendant. Should the victim fail to do as instructed, "Kevin" threatened to rape the victim's younger sister and kill and "annihilate" the victim's family. Defendant also informed the victim that "Kevin" had "cloned" both her own and her parents' cellular phones and could hear all their conversations.

Notably, the victim – who was unaware for nearly a year that "Kevin" was in fact defendant – described herself as "deathly afraid" of "Kevin" and even indicated that she went along with defendant's claim that she was his girlfriend "so he would be nice" despite having told defendant that she wanted to stop having sex with him. Defendant, meanwhile, informed the victim, whom he referred to as his "prize," that he was "Kevin's" assistant and that he had killed seven rivals of the "organization," but reassured the victim that he was trying to have "Kevin" reduce her "objectives."

Mindful 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), and includes situations "where one party is constrained by subjugation to [otherwise] do what [her] free will would refuse[,]" *People v Premo*, 213 Mich App 406, 411; 540 NW2d 715 (1995), the evidence in this case overwhelmingly points to the inference that the victim regarded defendant – whether acting as himself or "Kevin" – as one in a position of authority and that she submitted to numerous acts of sexual penetration due to coercion arising out of this authority. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (reasonable inferences from circumstantial evidence can constitute satisfactory proof of the elements of the crime).

Second, sufficient evidence was presented to show that defendant was "armed" with a gun under MCL 750.520b(1)(e). To show a defendant is "armed," the prosecution must prove either actual or constructive possession of a weapon. *People v Proveaux*, 157 Mich App 357, 361-362; 403 NW2d 135 (1987). Possession means knowledge of the weapon's location and reasonable accessibility. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

Here, the victim testified that defendant always carried a gun and that he had it on his person or within his reach at least 75 percent of the time they were engaged in sexual activity. Additionally, the victim explained that defendant once had his hand inside his pocket with his gun while she performed fellatio on him. Therefore, defendant was "armed" within the meaning of MCL 750.520b(1)(e).[3]

[3] Defendant attacks the victim's credibility because of inferences drawn from minor inconsistencies and the lack of physical evidence supporting the victim's claims. However, it is for the jury and not this Court to weigh issues of witness credibility, *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002), and physical evidence is not required to support the subject CSC charges, MCL 750.520h. Moreover, to the extent any of the witnesses' testimony conflicted, this Court must resolve all conflicts of evidence in the favor of the prosecutor, who need not negate every reasonable theory of innocence, but only prove his case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Finally, we note that to the extent defendant's argument may be construed as a challenge to the great weight of the evidence, the victim's testimony was not so far impeached that it was deprived of all probative value nor did it "contradict[] indisputable physical facts or laws" or def[y] physical realities . . . ." *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998) (quotation marks and citation omitted).

Defendant counters that as used in MCL 750.520b(1)(e), the word, "armed," means a defendant must use a weapon for the purposes of intimidating or threatening a victim and that the evidence failed to satisfy this requirement. *Proveaux* plainly instructs, however, that possession is the key to establishing this offense. As *Proveaux* explains: "[T]he Legislature intended to discourage the use of weapons by elevating forcible sexual penetration to a first-degree offense when the offender is armed. The possession of a weapon makes the sexual assault more reprehensible, increases the victim's danger, and lessens the victim's chances of escape." *Proveaux*, 157 Mich App at 362-363. No mention is made of intimidation or threats. Defendant's claim is not sustainable.

Defendant also asserts that there was insufficient evidence of venue. However, while "[v]enue is part of every criminal case and must be proved by the prosecutor beyond a reasonable doubt[,]" *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996), this Court has consistently held that "no error lies in the prosecution's failure to affirmatively prove venue in view of defendant's failure to object[,]" *People v Carey*, 36 Mich App 640, 641; 194 NW2d 93 (1971). Additionally, MCL 767.45(1)(c) specifically provides that "no verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." In view of defendant's failure to raise this issue below, no error lies on this ground.[4]

B. Specificity in the information and improper joinder[5]

i. Information

Defendant contends that the information's lack of specificity with respect to both the dates of the offenses and the actual charges deprived him of his due process right to notice and right to present a defense. As defendant failed to raise this issue below, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Due process entitles a defendant to reasonable notice of the charges against him and an opportunity to present his defense. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). Under MCL 767.45(1)(b), an information must contain the time of the offense "as near as may be[,]" but "[n]o variance as to time shall be fatal unless time is of the essence of the offense." "Time is not of the essence nor a material element in a criminal sexual conduct case, at least where the victim is a child." *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). When time is not an element of the offense, "any allegation of the time of the

[4] In any event, we note that the victim estimated that 60 to 70 percent of the 63 sexual encounters occurred in Isabella County and specifically noted that she engaged in oral sex with defendant while jogging near her house in Isabella County between five and ten times.

[5] While defendant asserts in his statement of questions presented that his due process rights were violated because there was a lack of proof of a unanimous verdict, "[d]efendant has abandoned this issue by failing to provide any analysis in the text of his brief on appeal. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009); MCR 7.212(C)(7).

commission of the offense . . . shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged . . . ." MCL 767.51. When evaluating whether the specificity of the time of the offense is adequate, we examine "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986).

The information in this case alleged that the offenses occurred between April 2007 and April 2008. Consistent with these allegations, the victim testified that there were 63 encounters with defendant involving sexual penetration over the course of a year. On this alone, the information was sufficient to satisfy MCL 767.51 for the CSC offenses, *Stricklin*, 162 Mich App at 634, and also for the accosting a child for an immoral purpose offense where the pertinent statute, MCL 750.145a, makes no reference to time whatsoever.

In any event, in view of the victim's testimony that 63 instances of sexual intercourse occurred periodically over the course of a year and that defendant provided her with marijuana and alcohol *during every incident*, it is understandable that the victim did not provide specific dates. Further, defendant not only failed to make a motion under MCL 767.51 for specificity to enable him to meet the charge, but also defendant has failed to elaborate the "many ways" he was prejudiced other than to cite case law for generic problems that may result from a defective information. It is certainly not incumbent upon us to craft defendant's arguments on this score. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). And while defendant asserts that the lack of specificity precluded him from presenting an alibi witness, this conflicts with his theory of the case – as stated in closing argument – that the sex was "consensual." Thus, there was no error let alone a violation of substantial rights.[6]

As a corollary to lack of specificity with respect to time, defendant maintains that because his CSC charges were overly broad in scope, he lacked notice of the precise charges against him. To determine whether an information provides sufficient notice of the charges against a defendant, "the dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense." *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989); see also *Russell v United States*, 369 US 749, 765; 82 S Ct 1038; 8 L Ed 2d 240 (1962). In other words, the defendant must be prejudiced by the information. *Traughber*, 432 Mich at 215. Consistent with this requirement, MCL 767.45(1)(a) requires the information to contain "[t]he nature of the offense stated in language that will fairly apprise the accused and the court of the offense charged."

The information in this case indicated that defendant was charged with engaging in either vaginal, oral, or digital penetration with a victim between the ages of 13 and 16 and that he coerced the victim by using his authority, or alternatively, that he engaged in said penetration while armed with a weapon or an article used or fashioned to lead the victim to believe it was a

[6] Given that there was no error, we also reject defendant's claim of ineffective assistance of counsel since counsel is not required to make a meritless motion or futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003)

weapon. In making his challenge, the crux of defendant's claim is that the charges give rise to a variety of ways of committing the penetration underlying each CSC I under two sets of circumstances (i.e., whether armed or in a position of authority). However, arguing that the information charged defendant with several methods of penetration under alternative circumstances is not the same as arguing that defendant was unaware of what he was being tried for. Regardless, defendant makes no argument that the alleged lack of specificity resulted in prejudice. We, too, can find no prejudice here.

ii. Joinder

Next, defendant claims that joinder of the charges against him was improper. Defendant failed to move for severance below, thus, we review this issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763; *People v Girard*, 269 Mich App 15, 19; 709 NW2d 229 (2005).

Joinder and severance of multiple offenses against a single defendant are governed by MCR 6.120. Regarding the propriety of joinder, MCR 6.120(B) instructs:

> (1) 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 this case, it is clear that the charges against defendant reflected a series of acts constituting a single scheme or plan. Specifically, defendant created the allusion that he belonged to an illegal "organization." After enticing the victim to join this "organization," defendant – often acting under the guise of a fictitious persona – required the victim to complete "objectives" consisting of numerous sexual acts in order for her to leave the "organization." This elaborate plan involved defendant calling the victim on a daily basis as either himself or "Kevin" (during which calls he disguised his voice) and threatening the victim either explicitly or implicitly through gruesome stories of the "organization's" activities. While defendant claims the crimes were separate and not sequential, joinder is appropriate where the acts are "logically related, and there is a large area of overlapping proof . . . ." *People v Williams*, 483 Mich 226, 237; 769 NW2d 605 (2009) (quotation marks and citations omitted). Moreover, that defendant's manipulative scheme took place over the course of a year is not dispositive as "multiple offenses may be 'related' as part of a single scheme or plan despite a lack of temporal proximity." *Id*. at 241 n 18.[7] Joinder was appropriate.[8]

[7] We note that both defendant and the prosecution cite *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977), for its reliance on the ABA standards regarding joinder. However, *Williams* held that the plain language of MCR 6.120 superseded *Tobey*, whose reliance on the ABA standards was incongruent with MCR 6.120, the controlling rule. *Williams*, 483 Mich 242-

(continued…)

C. Admissibility of the recorded telephone conversations

Defendant argues that the admission of the recorded telephone calls between himself and the victim denied him a fair trial. We review a trial court's decision regarding the admission of evidence for an abuse of discretion, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), and a trial court's ultimate decision on a motion to suppress evidence de novo, *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). The trial court's factual findings are reviewed for clear error. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

First, defendant challenges the admission of the recorded calls because the victim and her mother acted as police agents, and therefore, illegally obtained the recordings. The Fourth Amendment of the United States Constitution and the parallel provision of the Michigan Constitution protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. This protection is a limitation on government action; thus, "it is not applicable to a search or seizure, even an unreasonable one, conducted by a private person not acting as an agent of the government or with the participation or knowledge of any government official." *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991). To determine whether private action falls within the ambit of Fourth Amendment protection, two factors must be established: (1) "the police must have instigated, encouraged, or participated in the search," and (2) "the individual must have engaged in the search with the intent of assisting the police in their investigative efforts." *Id*. at 142-143. Mere "antecedent contact" between the private person and police as well as voluntarily providing police with an object obtained in a private search are both insufficient to establish a Fourth Amendment violation. *Id*.

At the evidentiary hearing, the victim's mother testified that she initiated the recording with defendant *after* the police informed her that additional physical evidence would help support the victim's claims and suggested the victim "wear a wire." Such testimony belies the mother's later assertion that the police never suggested that she record anything. The prosecution counters that because the victim's mother declined to follow the officer's specific suggestion of wearing a wire and instead employed an alternative means of recording, she acted independently of the police. However, such an argument is ultimately a distinction without a difference as the end result – a recorded conversation – was the same. Thus on the record before us, it appears the police not only provided the impetus for the recordings, but also the very reason the recordings were made was to assist in a police investigation.

At this juncture, it must be highlighted that whether defendant actually preserved this issue is dubious. In particular, while defendant noted in his September 2, 2008, motion that the recording was obtained "at the bequest . . . [of] law enforcement," at no other point during any hearing or ruling did defendant pursue this line of argument. Indeed, the trial court made no findings of fact or specific ruling with respect to this argument. Notwithstanding defendant's failure to clearly preserve this issue, however, we conclude that even if admission of the

---

(…continued)

243.

[8] Because joinder was appropriate, counsel's failure to file a meritless motion for severance did not constitute ineffective assistance of counsel. *Goodin*, 257 Mich App 433.

recordings were improper, such admission was harmless beyond a reasonable doubt in light of the abundance of incriminating evidence presented against defendant including the victim's own testimony recounting the substance of each recorded telephone conversation in detail. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001).[9]

We also reject defendant's claim that the Michigan eavesdropping statute, MCL 750.539a *et seq*., required suppression of the recorded phone calls because the victim, as a party to the conversation, was not an eavesdropper within the meaning of the statute. *People v Lucas*, 188 Mich App 554, 576 n 19; 470 NW2d 460 (1991) ("MCL 750.539c . . . contemplates that an eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on."). Furthermore, while the Michigan eavesdropping statute provides for criminal penalties and civil remedies, it makes no allowance for suppression. See MCL 750.539e and MCL 750.539f. Thus, defendant's reliance on this statute is unfounded. *People v Lyon* (*On Remand*), 227 Mich App 599, 611; 577 NW2d 124 (1998) (the exclusionary rule generally applies to constitutional and not statutory violations).

Defendant's last argument regarding the admissibility of the recorded conversations hinges on the initial 20-minute conversation between the victim and defendant that was later deleted. According to defendant, this recorded segment was crucial because it was during this conversation that he agreed to "role play" as "Kevin" and "stay in character" throughout the subsequently recorded conversations. Thus, defendant argues, due process required exclusion of all recorded conversations because admission of the recordings was "not fair."

As a preliminary matter, we note that defendant raised this issue regarding the deleted 20-minute conversation before trial only on reliability grounds, and it was not until his motion for a new trial that he argued the theory now presented on appeal, albeit in the context of challenging the effective assistance of counsel. Thus, we only consider this issue preserved to the extent it pertains to whether defendant was denied the effective assistance of counsel. *People v Gentner, Inc*, 262 Mich App 363, 368-369; 686 NW2d 752 (2004). To the extent defendant's argument rests on the propriety of admitting the deleted recording, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Whether a defendant is denied the effective assistance of counsel is a mixed question of fact and law. "A judge first 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." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error while the court's ultimate determination on whether defendant was denied the effective assistance of counsel is reviewed de novo. *Id*. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Under the standard set forth in *Strickland v*

[9] For this same reason, assuming without deciding that the recordings were admitted in violation of the federal Wiretapping Act, 18 USC 2510 *et seq*., because they were obtained without a warrant, see 18 USC 2515, 2518 (an issue defendant only vaguely alluded to below) a new trial is not in order.

Washington, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), establishing ineffective assistance of counsel requires a showing "that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007).

Here, although the issue of whether defendant was role playing at the victim's request during the recorded conversations was not raised before trial, the court did have the opportunity to evaluate defendant's version of events at the hearing on his motion for a new trial. That the court ultimately chose to believe the victim's version of events over defendant's after having heard defendant's testimony is not grounds for reversal where the trial court was in the superior position to render a credibility determination and its factual findings were not clearly erroneous. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Indeed, the record confirms the trial court's conclusion that the recordings played at trial contradicted defendant's claim that he agreed with the victim in the deleted recording to "stay in character." Thus, we can find no violation of substantial rights. Furthermore, we agree with the trial court that counsel did not render ineffective assistance where the recordings presented to the jury merely served to corroborate the victim's testimony and their admission, therefore, did not affect the outcome of the proceedings. For these reasons, the deleted 20-minute conversation between defendant and the victim serves as neither a basis for a new trial nor a claim for ineffective assistance of counsel.

D. Instructional error

Defendant's next assignment of error concerns a host of alleged improper jury instructions. However, defendant waived this issue when his defense counsel affirmatively indicated that he had no objection to the instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Where there is waiver, there is no error to review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even were we to review defendant's arguments, however, each lacks merit

A trial court is required to clearly present a case and instruct the jury on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003). Accordingly, "[j]ury instructions must include all the elements of the charged offense and not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

First, defendant claims the court's instructions for CSC I under MCL 750.520b(1)(b)(iii) were deficient because they failed to include the defense of consent. As a starting point, we recognize that sexual penetration of a victim under the age of 16 is a strict liability offense, which although not rising to a level of CSC I, is proscribed as a CSC III offense under MCL 750.520d(1)(a). *People v Cash*, 419 Mich 230, 240; 351 NW2d 822 (1984). CSC III under MCL 750.520d(1)(a) is a necessarily included lesser offense of CSC I under MCL 750.520b(1)(b)(iii) as the only difference between the two is that the latter offense requires the additional element that a defendant be "in a position of authority over the victim and [use] this authority to coerce the victim to submit." See *People v Nyx*, 479 Mich 112, 134 n 52; 734 NW2d 548 (2007). While this difference is the "aggravating fact" that subjects a defendant to punishment for CSC I in this case, "[t]he existence of an aggravating fact does not impose a new

mens rea on an act for which defendant would otherwise be strictly liable under the CSC-III statute." *Id.* at 142 (Markman, J., concurring). Thus, it follows that because consent cannot serve as an affirmative defense to CSC III involving penetration with a victim under the age of 16, *People v Worrell*, 417 Mich 617, 622-623; 340 NW2d 612 (1983), overruled in part on other grounds *People v Starks*, 473 Mich 227, 229; 701 NW2d 136 (2005), consent could not serve as a defense to the CSC I offense at issue. Therefore, the trial court had no obligation to provide such an instruction.

Second, defendant attacks the court's instructions concerning the "aggravating facts" of each CSC I offense. Neither instruction, however, was deficient. Regarding MCL 750.520b(1)(e), defendant maintains that the court failed to instruct that the evidence must show that defendant used a weapon to coerce or threaten the victim. As we previously explained, however, evidence of intimidation or threats is not required to sustain a conviction under MCL 750.520b(1)(e). *Proveaux*, 157 Mich App at 362-363. With respect to MCL 750.520b(1)(b)(iii), defendant claims the court's instructions failed to explain that the coercion must be used "to force the intercourse." However, "coercion for purposes of CSC cases extends to situations that do not involve the accomplishment of sexual contact or sexual penetration by raw physical force or threats of physical violence . . . ." *People v Reid*, 233 Mich App 457, 469 n 5; 592 NW2d 767 (1999). Indeed, subjugation of another to do what her free will would otherwise refuse constitutes implied, legal, or constructive coercion that is sufficient under the statute. *Id*. at 469. Thus, because the law does not support the CSC instructions defendant now requests, the court did not err in failing to provide them. *Katt*, 248 Mich App at 310.

Third, the court's instruction that the jury may consider evidence of sexual acts committed against the victim by defendant for which defendant was not on trial was proper under MCL 768.27a.[10] Consequently, defendant's argument that these instructions violated MRE 404(b) is misplaced and unavailing.[11] Additionally, the court's instruction that a victim under the age of 16 could not consent to intercourse was, as we previously concluded, an accurate statement of the law and was therefore proper. *Katt*, 248 Mich App at 310.

Defendant's final assignment of instructional error is that the court failed to give a specific unanimity instruction. "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). Here, the trial court instructed the jury that its verdict must be unanimous with respect to "the alternative options for the third element of criminal sexual conduct in the first degree," i.e., whether defendant was armed with a weapon or

[10] MCL 768.27a provides: "in a criminal case in which the defendant is accused of committing a listed offense against a minor [as provided under MCL 28.722], 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." The CSC I charges against defendant constitute "listed offenses" under MCL 28.722.

[11] While defendant challenges the court's instruction because evidence was admitted that defendant provided alcohol and marijuana to the victim, the challenged instruction concerns *only* sexual acts and makes no reference to alcohol or marijuana.

whether defendant was in a position of authority and used this authority to coerce the victim to submit to the penetration. According to defendant, this instruction was deficient because it failed to require unanimity for the specific theory of penetration underlying each specific CSC I conviction.

Our Supreme Court has held that where alternative acts are presented as evidence of the actus reus element of an offense, a general unanimity instruction is sufficient 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. [*People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

Defendant's argument is flawed because the different theories under which defendant was charged merely constitute different ways of defining the element of sexual penetration.[12] *People v Lynn*, 223 Mich App 364, 367; 566 NW2d 45 (1997). In other words, the alternative acts were not materially distinct. Further, as defendant's theory of the case was that the victim consented, there was no reason to believe the jurors were confused about the factual basis of defendant's guilt. Accordingly, no specific unanimity instruction was required.

IV. Defendant's standard 4 brief

A. Sentencing

Defendant begins his standard 4 brief by challenging the scoring of offense variables (OVs) 2, 7, 10, 11 and 19, and claims that correct scoring requires resentencing. This Court reviews the application of the sentencing guidelines de novo but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Absent an error in the scoring or reliance on inaccurate information in determining the sentence, this Court *must* affirm a sentence within the applicable guidelines range. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

When scoring an offense variable, "[a] sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or

[12] MCL 750.520a(o) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, 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." Defendant was charged with "penetrat[ing] the victim's vagina with his finger and/or his penis and/or penetrat[ing] the victim's mouth with his penis or engag[ing] in oral sex with her."

testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). A trial court's sentence may be invalid if it is based on a misconception of the law or inaccurate information. MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).[13]

i. OV 2

Turning to the specific OVs at issue, defendant first challenges his score of five points for OV 2. OV 2 is scored for "lethal potential of the weapon possessed or used." MCL 777.32(1). Five points are properly assessed under OV 2 if "[t]he offender possessed or used a pistol, rifle, shotgun or knife, or other cutting or stabbing weapon[.]" MCL 777.32(1)(d). In scoring OV 2, the court noted that defendant had his gun in his pocket while receiving oral sex from the victim and on at least one occasion defendant also had his hand in his pocket with the gun while receiving oral sex. The victim's testimony at trial confirms the court's findings. There was no error. MCL 769.34(10); *Kimble*, 470 Mich at 310-311.

Defendant counters that because it is unclear whether the jury convicted defendant of CSC I for being armed with a weapon or for being in and abusing his position of authority, this score was improper. However, this argument fails to apprehend that the scoring of this variable is not dependent on the elements of the underlying offense, but rather is appropriately scored if there is any evidence in the record to support the basis for scoring the offense variable provided defendant's conduct occurred before the sentencing offense was completed. *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009); *Elliott*, 215 Mich App at 260.[14] Furthermore, since being armed with a weapon was a charged offense, it was proper for the court to take into account conduct related to that charged offense. *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008). Thus, all the court needed to find was that "the offender possessed a pistol" to support a score of five points.

ii. OV 7

OV 7 is scored for "aggravated physical abuse." MCL 777.37(1). A trial court should assess 50 points for OV 7 when "[a] victim was treated with terrorism, sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a); *Hornsby*, 251 Mich App at 468. Here, the trial court assessed 50 points because defendant's threatening the victim and her family through the

[13] As a preliminary matter, defendant claims the trial court scored his OVs improperly based on facts not proven beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court determined in *People v McCuller*, 479 Mich 672, 677, 698; 739 NW2d 563 (2007), that under Michigan's indeterminate sentencing scheme, a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OVs to determine a defendant's minimum sentence.

[14] For this same reason, defendant's arguments that OV 7, OV 10, OV 11, and OV 19 were improperly scored because such scoring was not based on the elements of CSC I are without merit.

pretense of a fictitious "organization" was specifically designed to substantially increase the fear and anxiety the victim suffered during the offense.

The evidence unquestionably confirms that defendant's "organization" and "Kevin" substantially increased the victim's fear and anxiety suffered during the offense. Indeed, the victim explained that she was "deathly afraid" of "Kevin" who had threatened to rape and kill her family if she did not comply with his demands. And while actual physical abuse is not necessary to assess points under this variable, *People v Mattoon*, 271 Mich App 275, 277; 721 NW2d 269 (2006), the victim noted that defendant shook her to the point of bruising when she admitted to telling a friend about the "organization" and even tackled her and held her down on the ground when she declined an order from "Kevin" to have sex with defendant. Even the victim's mother noted that at her suggestion that they contact the police, the victim screamed at her and was pale for fear that "Kevin" would overhear the conversation. In sum, we agree with the trial court's description of defendant's conduct as "shocking" in an "awful, awful case," and find defendant's argument to the contrary unfounded. OV 7 was properly scored.

iii. OV 10

The court scored ten points for OV 10 ("exploitation of a vulnerable victim"). MCL 777.40(1). Ten points are appropriately scored if the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). OV 10 "applies when exploitive conduct, including predatory conduct, is at issue." *Cannon*, 481 Mich at 157. The word "exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b); see also *People v Wilkens*, 267 Mich App 728, 742; 705 NW2d 728 (2005). "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c); see also *Wilkens*, 267 Mich App at 742. "'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d).

In scoring points, the court noted that the exploitation occurred in conjunction with the victim's martial arts training and often occurred after defendant furnished alcohol or marijuana to the victim. Consistent with this finding, evidence was presented that defendant, who is 12 years the victim's senior, was an authority figure – a "big brother" as the victim described – not only as a martial arts instructor in which role he would discipline the victim, but also as a high-ranking member of the "organization" who threatened the victim unless she performed the sexual "objectives" he demanded. Considering these facts in conjunction with the victim's fear of "Kevin" and the fact that defendant supplied the victim with alcohol and marijuana during every sexual encounter, the victim was undoubtedly vulnerable and defendant clearly took advantage of this vulnerability and fear to satisfy his sexual appetites. Notably, the trial court expressed its opinion that while the prosecution only sought a score of ten points, a score of 15 points for predatory conduct would have been appropriate.[15] And while such egregious behavior may very

[15] MCL 777.40(1)(a) provides that a trial court must assign 15 points if predatory conduct was involved. MCL 777.40(3)(a) defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization."

well have satisfied the requirements for such a score, they certainly satisfied the requirements for a score of ten points. That defendant would now argue otherwise is particularly specious.

iv. OV 11

The trial court scored 25 points for OV 11 ("criminal sexual penetration"). MCL 777.41(1). Under OV 11, a court must score 25 points where "[o]ne criminal sexual penetration occurred." MCL 777.41(1)(b). The instructions for OV 11 provide that with the exception of the sexual penetration underlying the CSC I conviction, all sexual penetrations arising out of the sentencing offense must be scored. MCL 777.41(2)(a) and (c). Sexual penetrations arise out of the sentencing offense if they are connected to or have a relationship with the sentencing offense. *People v Johnson*, 474 Mich 96, 100-101; 712 NW2d 703 (2006). As *Johnson* explained:

> Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses [for an appropriate score under OV 11]. [*Id*. at 101]

Such a connection existed in this case where, as the trial court found, the victim testified that on one occasion "it started out as oral sex" until defendant penetrated her vagina with his penis by, in the victim's words, "mov[ing] me on to him kind of pulling me on top of him." The vaginal penetration in this instance clearly "result[ed] from" and was connected to the oral penetration in more than just an incidental way. *Id*. Thus, we conclude that this scenario is precisely the "cause and effect" relationship envisioned in *Johnson*. OV 11 was properly scored.

v. OV 19

The defendant received a score of 15 points for OV 19 ("interference with administration of justice or emergency services"). MCL 777.49(b) provides that 15 points must be scored when "[t]he offender used force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." "[T]he phrase 'interfered with or attempted to interfere with the administration of justice' encompasses more than just the actual judicial process[,]" *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004), and may include threats meant to deter a victim from reporting a crime provided the threats occurred before the conduct involved with the sentencing offense was completed, *McGraw*, 484 Mich at 122; *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006); see also, *Barbee*, 470 Mich at 286-288.

As the court found, defendant threatened the victim to deter her from reporting a crime. Indeed, the victim noted that she was afraid to tell anyone – including her school guidance

counselor – about the sexual abuse because defendant had threatened to kill, rape, and "annihilate" her family. We find no error in scoring this offense variable.[16]

As there was no scoring error, resentencing is not required in this case.

B. Prosecutorial misconduct

Defendant next argues he was denied a fair trial due to prosecutorial misconduct. The test of prosecutorial misconduct is whether defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The reviewing Court must examine the prosecutor's remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Here, defendant failed to object to the remarks he assigns as error on appeal. Our review of the allegations of error, therefore, is for plain error affecting substantial rights, i.e., outcome determinative error. *Carines*, 460 Mich at 763.

First, defendant asserts the prosecutor's questioning of and opening statement about his wife was irrelevant and prejudicial. In particular, defendant challenges as improper: (1) the prosecutor's eliciting testimony that his wife had no reason to doubt the victim, had not discussed the facts of the case with defendant, and was aware of defendant's CSC III conviction in Montcalm County, and (2) the prosecutor's statements that his wife was supporting defendant even though she had no reason to doubt the victim and that defendant manipulated his wife by having her leave the courtroom while recordings of his conversations with the victim were played.

Regarding the testimony of defendant's wife, the statements about her knowledge of events and defendant's criminal history bore directly on her credibility and were, therefore, relevant. *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001) (evidence of credibility is almost always relevant to aid the jury in determining accuracy of a witness's testimony). Similarly, whether defendant's wife had reason to doubt the victim was not an improper bolstering of the victim's credibility, *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989), but rather the question as presented appropriately sought facts bearing directly on the ultimate question of defendant's guilt. And facts making this issue more or less likely would fit the very definition of relevancy. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Additionally, foreshadowing this testimony during opening statement is not improper as the very purpose of an opening statement is to state facts that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). We note, however, that informing the jury that defendant had requested his wife not to hear the recorded conversations with the victim cannot be considered in any way relevant to whether defendant manipulated the

[16] We reject defendant's claim that OV 19 is unconstitutionally void for vagueness. The critical terms "interfere," "administration," and "justice" are neither unusual nor esoteric. Furthermore, the terms are not used in an unusual context and their definitions are readily ascertainable by reference to any dictionary. One certainly need not possess extraordinary intelligence to understand the conduct described in the statute, and fair notice is provided. *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006); *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005); *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004).

victim. Notwithstanding, even if there were error, we cannot find that this isolated comment violated defendant's substantial rights in view of the victim's explicit and consistent incriminating testimony. A new trial is not required on this ground.

Second, contrary to defendant's claim, the prosecution did not misstate the law regarding the possession of a weapon or the defense of consent. In any event, the trial court's proper legal instruction regarding the elements of the offense as well as its instruction that the court, and not the attorneys, was the only source of law cured any potential error. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002); *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Third, the prosecutor did not improperly shift the burden of proof by arguing that the defense could have subpoenaed Caleb, a classmate in whom the victim confided about the "organization." Rather, this rebuttal argument was a "fair response" to defense counsel's argument that the prosecution's failure to call Caleb supported the defense theory that the victim's version of events regarding the "organization" was not credible. *People v Fields*, 450 Mich 94, 111-113, 115; 538 NW2d 356 (1995). Moreover, this comment did not infringe upon defendant's right to testify. *Id*. at 112. In any event, any prejudice flowing from the prosecutor's remark was mitigated by the jury instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).[17]

Defendant maintains that cumulative errors of prosecutorial misconduct resulted in an unfair trial. The only potential error, however, did not prejudice defendant. Thus, defendant's trial was not unfair, and there is no basis for reversal. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003) (reversal is only warranted where the cumulative effect is so prejudicial that it denies defendant a fair trial).

C. Defendant's statement to police

Defendant argues that the admission at trial of his statement to police was improper because his interrogation did not cease after his request for an attorney.[18] As previously noted, we review the court's ultimate decision on a motion to suppress de novo, but review a trial court's findings of fact for clear error. *Akins*, 259 Mich App at 563; *Darwich*, 226 Mich App at 637.

Both the United States and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. "[A] suspect in police custody must be informed specifically of the suspect's right to remain silent and to have an attorney present before being questioned." *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998). Once a suspect requests an attorney, interrogation must cease until an attorney is present. *Id*. An

[17] As this comment was not improper, defendant's argument that the court erred in granting a mistrial on these grounds also fails.

[18] During the interrogation, in response to whether he had had sex with the victim 150 times, defendant indicated, "it was much less than that."

equivocal or ambiguous request for counsel, however, does not mandate the end of an interrogation. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). Similarly, a suspect's limited request for counsel, in particular a request for counsel to aid in answering a specific question, does not prohibit further interrogation on other topics. *People v Adams*, 245 Mich App 226, 233-234; 627 NW2d 623 (2001).

Testimony at the evidentiary hearing on this issue was contradictory. On the one hand, defendant asserted that although he requested a lawyer at least a dozen times, the interrogating officers proceeded with the interrogation. In contrast, the interrogating officers claimed that defendant requested a lawyer only in response to specific questions he was asked and that defendant actually asked additional follow-up questions himself. Given that no other evidence corroborates defendant's claim, and in view of the trial court's superior ability to judge credibility, we can find no clear error in the court's finding the officers more credible. Consequently, we conclude the admission of this evidence was consistent with the holding in *Adams* and find no error.[19]

D. Ineffective assistance of counsel

Finally, we reject defendant's last argument that counsel's failure to object to the admission of the recorded telephone conversations denied him the effective assistance of counsel on due process grounds and under MRE 403. Indeed, defendant has failed to show how the admission of this evidence, which merely corroborated the victim's testimony as previously noted in this opinion, was in any way outcome determinative. *Scott*, 275 Mich App at 526. And as we have already determined that the failure to admit evidence of the deleted 20-minute telephone conversation did not violate due process, let alone affect the outcome of the trial, defendant's additional argument of ineffective assistance of counsel on this score fails as well.

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray

[19] While defendant asserts that he did not freely and voluntarily waive his rights, defendant makes this argument wholly within the context of whether his interrogation was improper because he requested counsel.