STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2010
v	No. 288330 Oakland Circuit Court
DURAID HAITHAM FATHI, Defendant-Appellant.	LC No. 2007-214774-FC 2007-214813-FC 2007-215223-FH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant Duraid Haitham Fathi appeals as of right his jury trial convictions for eight counts of first-degree criminal sexual conduct (CSC I),[1] four counts of second-degree criminal sexual conduct (CSC II),[2] and two counts of fourth-degree criminal sexual conduct (CSC IV).[3] The trial court sentenced Fathi, as a second-habitual offender,[4] to 40 to 60 years' imprisonment for the CSC I convictions, 14 ½ to 22 ½ years' imprisonment for the CSC II convictions, and two to three years' imprisonment for the CSC IV convictions. We affirm.

I. BASIC FACTS

S.S., age 20 at the time of trial, stated that when he was around ten years old, he would spend time with Fathi, his father's best friend, and Fathi did things that made him feel uncomfortable. The first time this happened, Fathi came to S.S.'s house, picked him up, and took him to his apartment. S.S. began to play video games in the bedroom belonging to Fathi's roommate, V.O. Fathi then told S.S. to go into the other bedroom because Fathi wanted to show S.S. some new shoes. Fathi began to give S.S. a massage and, while doing so, he pulled down S.S.'s jeans and underwear. According to S.S., Fathi then "grabbed some lotion or some oil from . . . like a nightstand . . . and squirted some on his hand and rubbed some on my anus, and

[1] MCL 750.520b(1)(a) (person under 13).

[2] MCL 750.520c(1)(a) (person under 13).

[3] MCL 750.520e(1)(a) (person between 13 and 16).

[4] MCL 769.10.

he proceeded to anally penetrate me with his penis." Fathi also removed S.S.'s shirt, as well as all of his own clothing. S.S. was positioned face down on a pillow "with my butt sticking up in the air." During the incident, Fathi called S.S. "ma ha bee bee," which means "my friend or lover." Fathi moved in an up-and-down motion and ejaculated.

S.S. described the incident as "the worst pain you could ever imagine, times ten," and he was bleeding. Fathi then told S.S. to take a shower. When S.S. got out of the shower, he put on come clothes that Fathi had laid on the bed for him, and Fathi styled S.S.'s hair. S.S. spent that night at Fathi's house. He did not call his parents because he was scared; Fathi told him not to say anything or "he'd kill my mom, my dad, and my little brother." S.S. said he went to Fathi's apartment approximately 40 times and was assaulted in approximately the same way: "started with a massage and then the massage led into another massage and then it lead to . . . anal penetration." No one else was ever at the apartment during the incidents, which took place over a year's time. S.S. never told anyone. Fathi sometimes gave gifts to S.S.

At some point, before S.S. turned 12 years old, Fathi began taking him to a house instead of the apartment. And the abuse continued. S.S. testified that there were roughly 30 such assaults at the house, but they ended sometime before S.S.'s 12th birthday. S.S. eventually reported the abuse to Sergeant Troy Taylor of the Oak Park Police Department.

N.T., age 22 at the time of trial, testified that his brother, V.O., was five years older than him, and lived with Fathi. N.T. met Fathi when N.T. was about 11 or 12 years old. N.T. testified that, one night, he was in his bedroom when Fathi came in and closed the door. Fathi removed his own clothes as well as N.T.'s. According to N.T., Fathi "proceeded to lay on top of me face down and he lubricated his penis . . . and placed it in between my thighs." Fathi moved in an up-and-down motion. He also touched N.T.'s penis with his hand. After Fathi ejaculated, he got dressed and left the room. When N.T. was sure that Fathi and V.O. had left the house, he got up and took a shower. He did not tell his parents or V.O. what happened because he was "scared and embarrassed, ashamed, a combination of different things." N.T. testified that Fathi similarly assaulted him on about seven other occasions. N.T. eventually reported the abuse to Sergeant Taylor.

V.O. testified that he first met Fathi in the summer of either 1992 or 1993 when he was around 12 years old. V.O. was playing basketball with friends when Fathi approached them and asked if he could join their game. This happened "numerous" times. After about a week, Fathi invited V.O. back to his house. The first time V.O. went to Fathi's house, two of V.O.'s friends came with him, but they left before V.O. did, so he ended up alone with Fathi. At some point, according to V.O., "[Fathi] forced me onto the couch. He asked me if I wanted a massage at first, back rub, and then forced me onto the couch . . . and he proceeded to pull my pants [down]." When Fathi pushed V.O. on the couch, V.O. tried to get up, and he was scared and crying. Fathi pulled down V.O.'s underpants and then "[stuck] his penis between [V.O.'s] butt area." Fathi moved up and down until he ejaculated. According to V.O., "I told him to stop. I was crying because I was terrified. I didn't know what was going on. This man putting something between my legs." V.O. then cleaned himself off and left, but not before Fathi told him that "if I told anybody, he would hurt me. He would come after me." V.O. ran home but did not tell either his mother or stepfather what happened.

The next week, Fathi approached V.O. again while he was playing basketball and again invited V.O. to his house. V.O. felt that he was forced to go because of the threats Fathi had made against him and his family. While at Fathi's house, "he asked me to do the same thing again[.]" V.O. stated that such incidents happened on "numerous" occasions, perhaps 20 to 30. When asked if Fathi ever made V.O. touch another part of Fathi's body, V.O. responded, "he had me jack him off."

According to V.O., when he was about 15, Fathi began to "put[] his penis in my anal." The first time it happened, Fathi "threatened" V.O. and "threaten[ed] to burn . . . my mother's house down." When this happened, "he got real loud with me and started attacking me and then took me to my parents' house and had a can of gas in his hand and dumped the gas in the floor and my mother came out and she was scared. I didn't know what to tell her." When asked what he meant by "attacking," V.O. explained, "he grabbed me and was punching me in my mouth." After this attack, V.O. let Fathi have anal sex with him, and he described it as "painful, painful, very painful . . . I had blood from the tear." V.O. said he never went to a doctor "because I couldn't do nothing about it." At about the same time, Fathi also made V.O. perform oral sex. The incidents of anal penetration went on for the next five years, until V.O. was about 20.

V.O. admitted that he lived with Fathi because he felt trapped by him and feared for his family's well being if he did not do what Fathi wanted. When asked if he ever tried to leave Fathi, V.O. answered, "I've tried, but he would come back to my house and I would avoid going there and I was scared to call the police because I didn't know what the man was capable of." At some point in August 2000, the police came looking for Fathi, but V.O. did not know where he was and had not seen him since that time. V.O. explained that he did not tell the police what Fathi did to him because he was afraid and "ashamed" of the things that happened.

D.T., age 14 at the time of trial, testified that he knew Fathi because Fathi was a friend of his cousins, N.T. and V.O. Back in 1999 or 2000, D.T. remembered going to Fathi's house to play video games. D.T. had planned to spend the night and, at one point, in the bedroom, Fathi removed D.T.'s pajama bottoms and underpants and put his closed hand on D.T.'s penis and moved it "in an up and down motion." According to D.T., Fathi then "put his mouth around my penis and started sucking it." D.T. did not say anything because "I was very scared, I didn't know what to do." Fathi then tried to put his penis into D.T.'s anus but was not able to penetrate. D.T. remembered that something "liquidly" came out of Fathi's penis on D.T.'s stomach. At that point, N.T. and V.O. came into the house. Fathi put D.T.'s and his own clothes back on and walked out of the bedroom. D.T. did not tell anyone what happened because he "did not know what to do." Later on, when D.T. was at the police department with his mom to pick up N.T., D.T.'s mother asked D.T. if Fathi had ever touched his private parts and D.T. told her what happened, although he did not tell her everything that happened because he was scared.

C.C., age 14 at the time of trial, testified that he had been to Fathi's house to play with friends on approximately four other occasions. In August 2000, C.C. walked over by himself and knocked on the door. Fathi let him in and then instructed C.C. to lay down next to him on the couch, with his back up against Fathi's stomach. Although C.C. had seen Fathi before, he had never talked to him and did not know his name. According to C.C., Fathi pulled down C.C.'s pants and then pulled down his own pants and "put his penis in my butt, in the crack." C.C. elaborated, "he moved my butt cheek up [with his hand] so he could put it in my butt crack and he started moving back and forth." C.C. said that he felt awkward, but then eventually Fathi

told him that he could leave. C.C. went home, and when his mother got home from work, he told her what happened.

After having been found guilty on all counts, Fathi filed this claim of appeal.

II. APPELLATE COUNSEL'S BRIEF

A. RIGHT TO NOTICE OF CHARGES

1. STANDARD OF REVIEW

Fathi argues that he was denied his constitutional right to notice of the charges against him because the information on each charge was worded in general terms and the time periods were too broad. Fathi did not object to the informations in the trial court. Therefore, Fathi has not preserved this issue for appeal.[5] This Court reviews unpreserved, constitutional errors for plain error affecting a defendant's substantial rights.[6] Under the plain error rule, a defendant must show that "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant."[7] "Generally, the third factor requires a showing of prejudice—that the error affected the outcome of the trial proceedings."[8]

2. LEGAL STANDARDS

"The Due Process Clause of the Fourteenth Amendment mandates that a state's method for charging a crime give a defendant fair notice of the charge against the defendant, to permit the defendant to adequately prepare a defense."[9] Pursuant to MCL 767.45(1), an indictment or information must contain the following:

> a. The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.
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> b. The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.
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> c. That the offense was committed in the county or within the jurisdiction of the court. . . .

The test for sufficiency of an indictment is:

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[5] MCL 767.76; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

[6] *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006).

[7] *Id.* at 279.

[8] *Id.*

[9] *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009).

> "Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case?"[10]

"An information is presumed to be framed with reference to the facts disclosed at the preliminary examination."[11]

3. APPLYING THE STANDARDS

The information in Case No. 2007-214774-FC gave a time frame of April 2000 through August 2000. It listed five counts of CSC I with S.S., identified as a person under 13, specifically "penis in anus." It also included two counts of CSC IV, victim between 13 and 16, in regard to N.T. Further, the testimony of victims S.S. and N.T. at the preliminary examinations provided information on location and time frames. S.S. testified that, in approximately May or June 2000, at Fathi's house in Oak Park, when S.S. was 11 going on 12 years old, Fathi anally penetrated him. He testified to a second incident where Fathi anally penetrated him, which occurred at a time when C.C. was playing at the house. S.S. stated that such incidents happened roughly 40 times in Oak Park from May 2000 until sometime before he turned 12 on August 24, 2000. N.T. testified that when he was around 13 or 14, on two to three occasions, Fathi "would rub his penis in between my thighs" at the house in Oak Park. Fathi also touched N.T.'s penis. N.T. later stated that he was in middle school when the incidents happened.

In Case No. 2007-214813-FC, the information specified a time frame of May 22, 1999, through May 22, 2000, and listed three counts of CSC I in regard to S.S., victim under 13, penis in anus. S.S testified that, in May 1999 or 2000, when he was 10 or 11 years old, Fathi anally penetrated him while they were at Fathi's apartment in Pontiac. He stated that similar incidents happened approximately 30 times. A Pontiac Police detective also testified that he obtained records indicating that Fathi had the Pontiac apartment from 1999 to 2000.

In Case No. 2007-215223-FH, the information specified that counts 1 and 2 occurred in Spring/Summer 1997, and counts 3 and 4 occurred in Spring/Summer 1998. All four counts were CSC II, person under 13, in regard to N.T. At the preliminary examination, N.T. testified that he was about 11 years old when first met Fathi sometime in either 1996 or 1997. N.T. stated that on one occasion, when he was 11 years old, Fathi came to N.T. 's house in Madison Heights late at night with V.O. Fathi entered N.T.'s bedroom and got in bed with him. Fathi removed both N.T.'s pants and his own, and then rubbed his penis in between N.T.'s thighs. Fathi also touched N.T.'s penis during this incident. N.T. stated that three similar incidents happened in Madison Heights before he turned 13 years old, but they occurred at Fathi's home in Madison Heights.

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[10] *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), quoting *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994).

[11] *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Although the information in each case indicated only a range of months and not specific dates, "[t]ime is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim."[12] And the complainants' testimonies at the preliminary examinations provided further information on location and time frames. Fathi has not demonstrated how his ability to prepare a defense was prejudiced. The defense's theory was that no sexual contact occurred, and defense counsel argued to the jury that the victims were not credible and their testimonies illogical. Fathi does not indicate that he would have presented a different defense had additional details about the alleged offenses been provided in each information. Accordingly, we conclude that Fathi was not denied his constitutional right to notice of the charges against him.

B. ADEQUATE JURY INSTRUCTIONS

1. STANDARD OF REVIEW

Fathi argues that he was denied his right to clear and adequate jury instructions because the jury instructions, like the informations, included multiple, undifferentiated counts of CSC in regard to both complainants, and therefore, the jury was left to guess which alleged act corresponded to which count. Although defense counsel's affirmative expression of satisfaction with the trial court's jury instructions waived any alleged error with the jury instructions,[13] we will provide a brief review of this issue as unpreserved because Fathi uses it as a basis to claim ineffective assistance of counsel. An unpreserved instructional error is reviewed for plain error.[14]

2. LEGAL STANDARDS

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him."[15] A trial court must "instruct the jury regarding the law applicable to the case, . . . and fully and fairly present the case to the jury in an understandable manner."[16] "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence."[17]

3. APPLYING THE STANDARDS

The trial court first instructed the jury that, in Case No 07-214774-FC, Fathi was charged, in counts 1 through 5, with CSC I. The trial court specified that the crimes were alleged to have occurred on or about April 2000 through August 2000 in Oak Park. The trial court further

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[12] *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007).

[13] *Chapo*, 283 Mich App at 3722-373.

[14] *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

[15] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

[16] *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991), citing MCL 768.29.

[17] *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

explained that these counts related to S.S., when he was younger than 13 years old, and then the trial court gave the elements of CSC I. The jury was further instructed that, in the same case and same time frame, Fathi was charged in counts 6 and 7 with CSC IV with respect to N.T., when he was 13, 14, or 15 years old. The trial court gave the elements for that crime as well.

The trial court next told the jury that, in Case No 07-214813-FC, in counts 8, 9 and 10, Fathi was again charged with CSC I with respect to S.S. when he was younger than 13, and the acts were alleged to have occurred on or about May 22, 1999, through May 22, 2000, in Pontiac. The trial court repeated the elements of CSC I.

Finally, the trial court instructed the jury that, in Case No. 07-215223-FH, Fathi was charged, in counts 11 and 12, with CSC II alleged to have occurred in Spring or Summer 1997, in Madison Heights, with respect to N.T. when he was younger than 13. The trial court again gave the elements for CSC II. The trial court then specified that Fathi was charged with CSC II in counts 13 and 14, which also involved N.T. when he was younger than 13, and occurred in Spring or Summer 1998 in Madison Heights. The trial court gave the elements of CSC II a third time. Moreover, the verdict forms also included each count, the related victim, the city where the act was alleged to have occurred, and the time frame.

After further instruction, the trial court again summarized the charges in each case, the counts, the victims, the time frame, and the city. Thus, the trial court presented the case to the jury in an understandable manner,[18] and the instructions included all the elements of the charged offenses.[19] Moreover, the trial court instructed the jury, "[T]hese are separate crimes, . . . and the prosecutor is charging the defendant committed all of them. You must consider each crime separately in light of all the evidence in the case. You may find the defendant guilty of all, any one, any combination of these crimes, or not guilty." Thus, even if there had been error, Fathi suffered no prejudice because "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors."[20]

C. DOUBLE JEOPARDY

1. STANDARD OF REVIEW

Fathi argues that his convictions on several identically worded charges put him at risk of double jeopardy. Fathi did not raise a double jeopardy argument at trial. Therefore, we review this issue for plain error affecting substantial rights.[21]

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[18] *Moore*, 189 Mich App at 319.

[19] *McGhee*, 268 Mich App at 606.

[20] *Chapo*, 283 Mich App at 370 (quotations and citation omitted).

[21] *Pipes*, 475 Mich at 270.

2. LEGAL STANDARDS

"Under the Double Jeopardy Clause of the Michigan Constitution and United States Constitution, an accused may not be put in jeopardy twice for the same offense."[22] "The Double Jeopardy Clause of the Fifth Amendment protects against two general governmental abuses: (1) multiple *prosecutions* for the same offense after an acquittal or conviction[.]"[23]

3. APPLYING THE STANDARDS

Fathi's argument, aside from being unpreserved, is premature, because he has not been subjected to a second prosecution for an event occurring during the same time period. Further, the United States Supreme Court had consistently rejected "the idea that crimes arising from the same criminal episode constitute the same offenses for double jeopardy purposes[.]"[24] Therefore, Fathi's argument is without merit.

D. EFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

Fathi argues that he received ineffective assistance of counsel because defense counsel failed to object to the lack of notice, inadequate jury instructions, and violation of double jeopardy. Because the trial court did not hold an evidentiary hearing, "our review is limited to errors apparent on the record."[25]

2. LEGAL STANDARDS

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel."[26] Generally, to establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or

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[22] *People v Grace*, 258 Mich App 274, 278; 671 NW2d 554 (2003), citing Const 1963, art 1, § 15; US Const, Am V.

[23] *Id.* at 279 (quotation and citation omitted) (emphasis in original).

[24] *People v Nutt*, 469 Mich 565, 578; 677 NW2d 1 (2004).

[25] *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009).

[26] *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

unreliable."[27] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."[28]

3. APPLYING THE STANDARDS

For all the reasons stated above, Fathi received adequate notice of the charges against him, his jury was properly instructed, and his right against double jeopardy was not violated. "Counsel is not ineffective for failing to advocate a meritless position."[29]

E. OTHER ACTS EVIDENCE

1. STANDARD OF REVIEW

The trial court granted the prosecutor's pretrial motion to allow other acts evidence of: (1) sexual contact with C.C. on August 14, 2000; (2) sexual contact with D.T. in September 1999 when D.T. was five years old; (3) Fathi's conviction and judgment of sentence in Sweden for instigation of the sexual exploitation of a minor and complicity in the sexual exploitation of a minor; (4) a conviction involving another minor, F.C.; and (4) DNA evidence recovered from C.C. that matched Fathi. Fathi argues that the trial court erred in admitting the other acts evidence pursuant to MCL 768.27a and allowing police officers to testify that additional charges against Fathi were pending.

"'When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo.'"[30] "Otherwise, we review for abuse of discretion a trial court's decision to admit evidence."[31]

2. MCL 768.27a / MRE 404B CONFLICT

Fathi argues that MCL 768.27a conflicts with MRE 404b and asserts that the rule of evidence takes priority over the statute.

MCL 768.27a provides:

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[27] *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland*, 466 US at 694.

[28] *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

[29] *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (quotation and citation omitted).

[30] *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007), quoting *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

[31] *Id*.

> (1) Notwithstanding section 27,[32] 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
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> (2) As used in this section:
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> > (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
> >
> > (b) "Minor" means an individual less than 18 years of age.

Here, Fathi was accused of committing CSC I, CSC II, and CSC IV, which are all listed offenses under MCL 28.722(e)(x).[33]

This Court has explained that, because the Michigan Supreme Court has the exclusive authority to promulgate rules governing practice and procedure in Michigan courts, "when resolving a conflict between a statute and a court rule, the court rule prevails if it governs purely procedural matters. This tenet applies equally to a conflict between a statute and a rule of evidence."[34] However, this Court has clarified that, "MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts," and therefore, "it does not violate the principles of separation of powers."[35] Further, according to this Court,

> When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual

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[32] MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

[33] See MCL 768.27a(2)(a).

[34] *Donkers v Kovach*, 277 Mich App 366, 373; 745 NW2d 154 (2007) (internal citations omitted).

[35] *Pattison*, 276 Mich App at 619-620.

> offenses against minors without having to justify their admissibility under MRE 404(b). In many cases, it allows evidence that previously would have been inadmissible, because *it allows what may have been categorized as propensity evidence to be admitted in this limited context*.[36]

This Court added 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.[37]

Therefore, we conclude that Fathi's argument is without merit.

3. PRIOR CONVICTION

Fathi argues that by use of the language "evidence that a defendant committed another listed offense,"[38] the statute requires that a defendant already have a prior conviction. Therefore, according to Fathi, besides the 1991 misdemeanor conviction involving F.C., the other acts were inadmissible pursuant to MCL 768.27a.

This Court has not construed MCL 786.27a as requiring a conviction. In a case where the defendant was charged with CSC II against a minor, this Court stated that "evidence that the defendant committed another crime of [CSC II] against a minor may be admitted under MCL 768.27a, independent of MRE 404(b), *even if there was no conviction for the other crime*."[39] Further, "[w]hen a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors . . . ."[40] Therefore, Fathi's argument is without merit.

4. RELEVANCE

Fathi contends that the trial court failed to consider the relevance of the other acts evidence as well as its prejudicial effect when weighed against its probative value and concludes that the evidence in this case cannot meet the requirements of MRE 403. Fathi argues, first, that admission of the testimony from V.O., D.T., and C.C. caused confusion of the issues. Second, he argues that the conviction involving F.C. was not relevant because the complainants were young males, whereas F.C. was a 14-year-old girl and the conviction was from 1991. Third, Fathi argues that V.O.'s accusations included testimony that Fathi performed unwanted sexual

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[36] *Id.* at 618-619 (emphasis added).

[37] *Id.* at 620.

[38] MCL 768.27a(1).

[39] *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008) (emphasis added).

[40] *Pattison*, 276 Mich App at 618-619.

acts on him while V.O. was an adult, living with Fathi as his roommate. Further, according to Fathi, V.O.'s testimony was more prejudicial than probative because he claimed that Fathi abused him every day from age 13 to age 20, Fathi threatened him, he was afraid of Fathi and felt trapped, and Fathi was "evil."

In *Pattison*, this Court explained:

> [O]ur 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. In cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors.[41]

However, this Court further stated, "Although we find this information extraordinarily pertinent to a given defendant's behavior in a similar case, *we caution 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*. See MRE 403."[42] MRE 403 states, in pertinent part, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

Here, there is no evidence that the trial court conducted any sort of review under MRE 403 before deciding to admit the other acts evidence. However, "[t]his Court will not reverse a trial court decision when the lower court reaches the correct result even if for a wrong reason."[43]

In this case, the evidence that Fathi had assaulted other minors—F.C., V.O., D.T. and C.C.—was relevant because it tended to show that it was more probable than not that S.S. and N.T. were telling the truth. The number of previous victims (including F.C., even though she was a female) also made the likelihood of Fathi's behavior toward S.S. and N.T. more probable because all of the abuse involved minors. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Whether S.S. and N.T. were telling the truth had significant probative value in deciding whether Fathi should be convicted of the crimes for which he was charged. Further, defense counsel was able to effectively cross-examine D.T. (as he did S.S. and N.T.) regarding why he never told anyone what happened or called for help when others were near.[44] Even though Fathi objects that V.O. testified to anal intercourse when he was an adult, one can see where such testimony would actually be more helpful to Fathi's case than harmful because, as defense counsel brought out during cross-

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[41] *Id*. at 620.

[42] *Id*. at 620-621 (emphasis added).

[43] *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

[44] See *People v Mann*, __ Mich App __; __ NW2d __ (Docket No. 288329, issued April 8, 2010), slip op, p 3.

examination, at the time, V.O. was living with Fathi as a roommate and contributing to the rent, despite his allegations of abuse.

Finally, the trial court instructed the jury on how to properly use the other acts evidence:

> The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with minors for which he is not on trial. Before you may consider such acts against the defendant, you must first find that the defendant actually committed those acts. If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the offenses for which he is now on trial.

Thus, we conclude that the testimony from D.T., C.C., and V.O., as well as the evidence of Fathi's conviction regarding F.C., was relevant and not more prejudicial than probative.

5. REFERENCE TO PENDING CHARGES

Fathi argues that, during the testimony of Sergeant Troy Taylor, the prosecutor elicited the fact that numerous other criminal charges were pending against him in cases involving C.C., R.T., V.O., and D.T. Fathi contends that, even if the other acts witnesses' testimony was admissible, the fact that charges were pending was not.

Fathi did not preserve this issue at trial, and therefore, review "is limited to determining whether a plain error affected substantial rights."[45] It is true that the fact that charges had been brought against Fathi for committing listed offenses against other individuals is not evidence that he committed the acts. In fact, in its instructions, the trial court stated that "the fact that the defendant is charged with a crime and is on trial is not evidence. Likewise, the fact that he's charged with more than one crime is not evidence." However, explaining to the jury that they were only considering charges involving S.S. and N.T. was necessary to prevent confusion of the issues.

Toward the end of her opening statement, the prosecutor said, "[L]adies and gentlemen, we're not here today for the assaults on [F.C.] or [D.T.] or [C.C.] or [V.O.], but you can consider those assaults when determining the guilt in regards to [S.S.] and [N.T.]." Presumably in response to this statement, defense counsel himself was the first to mention the subject of charges in his opening statement:

> When we started off the trial, we started with the presumption of innocence and at the conclusion of this trial you're going to find that the presumption of innocence still attaches and [defendant] is not guilty of the crimes that they have charged him with. You have to remember, they haven't charged [with D.T.]. They have not charged [with C.C.], and they have not charged [with V.O.]. The cases you have to consider involve[] [S.S.] and they involve [N.T.].

[45] *Bauder*, 269 Mich App at 180.

Later on, defense counsel said, "now he is not charged, again, with anything with [V.O.] in this case." Finally, defense counsel stated, "but he's not charged with [C.C.]. Understand that. He's not charged with [V.O.]. You understand that. He's not charged with [D.T.]. You understand that. He's not charged with that."

Although defense counsel's intent is clear, his choice of wording was not, and therefore, the prosecutor later sought to elicit testimony from Sergeant Maureen Bergman that a warrant was issued in C.C.'s case and from Sergeant Taylor that he was aware that charges were pending against Fathi that involved D.T. Moreover, despite Fathi's assertions to the contrary, it is not clear that charges involving R.T. were discussed. Sergeant Taylor merely testified that, after obtaining written statements from R.T., N.T., and S.S., he submitted a report to the Oakland County's Prosecutors Office. Finally, as noted above, the trial court properly instructed the jury on how to use the other acts evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."[46] Therefore, Fathi cannot show prejudice.

F. ADMISSION OF EXPERT TESTIMONY

1. STANDARD OF REVIEW

Fathi argues that the trial court erred in admitting Amy Allen's expert testimony on the dynamics of sexual abuse and the common characteristics of children who allege sexual abuse. "This Court reviews for an abuse of discretion a trial court's decision to admit or exclude expert witness testimony. This Court also reviews for an abuse of discretion a trial court's decision on an expert's qualifications."[47] "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes."[48]

2. LEGAL STANDARDS

Pursuant to MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, "[t]o be admissible, expert testimony must comply with a three-part test. First, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of

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[46] *Chapo*, 283 Mich App at 370.

[47] *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

[48] *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline."[49]

3. EXPERT QUALIFICATIONS

Fathi argues that Allen was not qualified to be an expert because (1) there are no requirements or qualifications to become a forensic interviewer, (2) her only "expertise" was based on experience, and (3) she does not work as a counselor or psychologist and has done no research and writing on the subject.

"An individual must be qualified by 'knowledge, skill, experience, training, or education' to testify as an expert witness."[50] "In exercising its discretion, a trial court should not require a proposed expert witness to satisfy an overly narrow test of qualifications."[51]

In this case, Allen was qualified to offer testimony on the dynamics of sexual abuse and the common characteristics of children who allege sexual abuse. She was employed at Care House of Oakland County, an advocacy center for children, as the case manager and lead forensic interviewer since 2002, and had previously worked there from 1992 to 2000. Allen also worked in the child protection unit at Oakland Family services for several years. She had two bachelor's degrees, one in psychology and one in behavioral science, and a master's degree in criminal justice. She belonged to the American Professional Society on the Abuse of Children, Michigan chapter, and the Michigan Children's Alliance. She teaches forensic interviewing for the Governor's Task Force on Children's Justice, the Prosecuting Attorneys Association of Michigan, Michigan Probate Judges, Oakland Police Academy, Macomb Police Academy, and the Michigan Conference on Child Abuse. Furthermore, Allen had recently traveled to the country of Moldova, at the request of the United States Department of Justice, to teach forensic interviewing. Allen had also had continuing education in the field of sexual assault victims, including attending several national conferences. She had conducted about 4,000 forensic interviews over the course of her career. Thus, with her experience and education, despite the fact that Allen not a licensed psychologist and had never published any peer-reviewed articles, the trial court did not err in qualifying Allen as an expert.[52]

4. RELIANCE

Fathi also argues that Allen's testimony on delayed disclosure was not helpful to the jury and was not based on reliable scientific principles.

The Michigan Supreme Court has held that:

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[49] *People v Coy*, 258 Mich App 1, 10; 669 NW2d 831 (2003).

[50] *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995), citing MRE 702.

[51] *Id*.

[52] *Id.* at 225.

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.[53]

More specifically, the Court found that, in one of the underlying consolidated cases,

> the trial court exercised the proper discretion in allowing a single expert to clarify *why child victims of sexual assault frequently delay reporting the incident*. . . .
>
> . . . . We therefore find that where there are common misperceptions regarding the behavior of the victim on which a jury may draw an incorrect inference, *such as the delayed reporting*, the prosecutor may present limited expert testimony dealing solely with the misperception. However, as we noted in [*People* v *Beckley*, 434 Mich 691; 456 NW2d 391 (1990)], the evidence has very limited use and should be admitted only to state that certain behavioral characteristics are common among victims of child sexual abuse.[54]

The Court then reiterated that "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty."[55]

In this case, Allen's testimony was confined to acceptable parameters. On the basis of her experience in interviewing children over the course of her career, she explained several reasons why children delay reporting sexual abuse. She specifically stated that she had never met any of the complainants or other acts witnesses in the case at bar, and the trial court informed the jury during her cross-examination that she was not there to determine if the witnesses were telling the truth. Allen based her testimony on behavior of child victims of sexual abuse in her extensive experience, including 4,000 forensic interviews.[56] Therefore, Allen's testimony met the requirements of MRE 702.

5. DISCLOSURE OF DATA

Fathi argues that it was plain error for the trial court to not require Allen to produce her data regarding the two studies that she referred to during her testimony.

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[53] *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995).

[54] *Id*. at 379 (emphasis added).

[55] *Id*. at 352.

[56] See *In re Noecker*, 472 Mich 1, 11-12; 691 NW2d 440 (2005) (stating that expert's testimony on alcoholism was admissible where he had "treated hundreds of individuals with respect to alcoholism," and "he testified about what conduct is consistent with that of an alcoholic.")

Allen testified that there is a difference in delayed disclosure cases between boys and girls because "there is research that indicates that boys are more reluctant to disclose their sexual abuse. There is [sic] some 1991-1994 studies that depict that boys disclose less frequently than girls." She added, "[T]here is also research that indicates that children who are sexually assaulted within the family have a longer delay in their disclosure than children who are sexually assaulted by a stranger."

It is true that, pursuant to MRE 703, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence"; however, "[t]his rule does not restrict the discretion of the court *to receive expert opinion testimony* subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."[57] Furthermore, MRE 705 states that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.*"[58]

At one point in Allen's testimony (notably, not when she referred to the above-mentioned studies, but rather, when she was discussing "event" and "process" disclosure), defense counsel asked that she produce the research. The trial court asked Allen if she had the research, and she said, "I have some." Defense counsel asked that it be produced and objected that it had not been produced prior to trial. The trial court stated, "This is expert testimony" and allowed Allen to continue. Defense counsel did not revisit the subject of research during his cross-examination, but rather, focused on the facts that Allen had never met any of the alleged victims, that there exists no scientific process by which to determine why an individual delays disclosure, and that there was "no scientific method of determining sexual abuse." The trial court reminded the jury that Allen was "not an expert in the field to tell you who is telling the truth and who isn't." Therefore, we conclude that any error in not admitting the research into evidence was not outcome determinative, and therefore, harmless.[59]

G. FLIGHT INSTRUCTION

1. STANDARD OF REVIEW

Fathi argues that the trial court erred in giving a flight instruction because the evidence did not support it. Fathi did not preserve this issue; therefore, our review is limited to determining whether plain error affected his substantial rights.[60]

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[57] Emphasis added.

[58] Emphasis added.

[59] *People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006).

[60] *People v McCrady*, 244 Mich App 27, 29; 624 NW2d 761 (2000).

2. LEGAL STANDARDS

"It is well established that evidence of flight is admissible to show consciousness of guilt."[61] "Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction."[62] In addition, "[t]he term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody."[63] Nevertheless, "[f]light can result from factors other than guilt, and it is for the jury to determine what caused defendant to flee."[64]

3. APPLYING THE STANDARDS

V.O. testified that in August 2000, the police came looking for Fathi at the Oak Park residence where both he and Fathi lived, but V.O. did not know where Fathi was. It was no secret that the police were looking for Fathi in regard to C.C.'s allegations. And although Fathi's belongings were still in the Oak Park house at that time, Sergeant Bergman later discovered that Fathi had been staying with his sister in New Jersey since mid-August 2000. Thus, the prosecution presented ample circumstantial evidence of flight.

Furthermore, the trial court gave the following instruction:

> There has been some evidence that the defendant ran away after the alleged crime. This evidence does not prove guilt. A defendant may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows that the defendant had a guilty state of mind.

Fathi was not prejudiced by the trial court's accurate statement of the law regarding flight, and therefore, there was no plain error warranting reversal.

H. SENTENCING

1. DEPARTURE FROM SENTENCING GUIDELINES

a. STANDARD OF REVIEW

Fathi argues that there were several errors in the trial court's decision to depart from the sentencing guidelines. When a trial court departs from the sentencing guidelines, "this Court reviews for clear error the trial court's factual finding that a particular factor in support of

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[61] *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

[62] *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), citing CJI2d 4.4; 29 Am Jur 2d, Evidence, § 532, p 608.

[63] *Id.*

[64] *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992).

departure exists. However, whether the factor is objective and verifiable is a question of law that this Court reviews de novo."[65] This Court reviews for an abuse of discretion "the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence."[66] This Court also reviews for an abuse of discretion the amount of the departure.[67] An abuse of discretion occurs when the trial court "selects an outcome that does not fall within the range of reasonable and principled outcomes."[68] On appeal, this Court must "engage in a proportionality review. Such a review considers 'whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record . . . .'"[69] "[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment."[70] In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender.[71]

If the sentence constituted a departure from the guidelines range, the trial court's articulation of the reasons must be sufficient to permit effective appellate review.[72] If this Court finds that the trial court did not have a substantial and compelling reason for the departure, it must remand for resentencing.[73] If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing.[74] If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing.[75] If the trial court would have imposed the same sentence regardless of a misunderstanding of the law or an irregularity in the proceedings, this Court may affirm.[76]

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[65] *Petri*, 279 Mich App at 420-421, quoting *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007) (internal citations omitted).

[66] *Id*.

[67] *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

[68] *Petri*, 279 Mich App at 420-421.

[69] *Smith*, 482 Mich at 304-305, quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003).

[70] *Babcock*, 469 Mich at 263.

[71] *Id.* at 270.

[72] *Smith*, 482 Mich at 304.

[73] MCL 769.34(11); *Babcock*, 469 Mich at 265.

[74] *Smith*, 482 Mich 304; *Babcock*, 469 Mich 258-259.

[75] *Babcock*, 469 Mich 260.

[76] *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

b. LEGAL STANDARDS

A trial court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure.[77] A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range, unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight.[78]

Factors meriting departure must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth.[79] To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed.[80] The trial court may draw inferences about the defendant's behavior from the objective evidence.[81] To ascertain whether a factor was given inadequate or disproportionate weight in the guidelines calculations, a trial court must first determine the effect of the factor on the recommended minimum sentence range.[82]

c. APPLYING THE STANDARDS

CSC I is a Class A felony.[83] Fathi had a PRV score of 30. He received five points for PRV 2—prior low severity felony conviction;[84] five points for PRV 5—prior misdemeanor conviction;[85] and 20 points for PRV 7—concurrent felony convictions.[86] This resulted in a PRV level D.[87] Fathi's OV score was 100. He received 10 points for OV 3—physical injury to a victim;[88] 10 points for OV 4—serious psychological injury requiring professional treatment occurred to a victim;[89] 15 points for OV 8—victim asportation;[90] 15 points for OV 10—

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[77] MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

[78] MCL 769.34(3); *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007).

[79] *Smith*, 482 Mich at 299, 303.

[80] *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

[81] *Petri*, 279 Mich App at 422.

[82] *Young*, 276 Mich App at 451.

[83] MCL 777.62.

[84] MCL 777.52.

[85] MCL 777.55.

[86] MCL 777.57.

[87] MCL 777.62.

[88] MCL 777.33.

[89] MCL 777.34(1)(a).

[90] MCL 777.38(1)(a).

predatory conduct;[91] 25 points for OV 13—continuing pattern of criminal behavior;[92] and 15 points for OV 19—use of force or threat of force.[93] This resulted in an OV level of VI for a Class A offense and a guidelines range of 171 to 356 months (14 ¼ to 29 2/3 years) (at habitual offender level 2) for the CSC I charges.[94]

At sentencing, the trial court first noted that Fathi had prior convictions for a felony and two misdemeanors, and noted that he fled to Sweden. The trial court then stated that, while in Sweden, Fathi was convicted of instigation of sexual exploitation of a minor and was sentenced to prison. The trial court concluded that there were substantial and compelling reasons to justify an upward departure from the sentencing guidelines, which "did not adequately account for the seriousness of Fathi's conduct." The trial court then gave the following reasons:

> 1. The guidelines do not take into account the repeated number of times [Fathi] sexually assaulted one of these boys. This young boy's life was ruined as a result of [Fathi]'s sexual abuse.
>
> 2. The sentence guidelines do not take into account [Fathi]'s assault of children in Sweden. [Fathi] continued his deviant conduct during his flight from justice, which makes him a threat to all children.
>
> 3. The guidelines do not take into account the depth of the psychological trauma on these boys.
>
> 4. [Fathi]'s behavior is disgusting and revolting. His past conduct clearly indicates that he is a monstrous predator, and . . . is highly likely to re-offend. He is danger to society. The People of the State of Michigan must be protected from pedophiles such as this defendant.

The trial court added that it believed that "the sentence to be imposed today is proportionate to the seriousness of [Fathi]'s conduct, regardless of any potential errors in the scoring of the sentencing guidelines or the statements of this court." The trial court then sentenced Fathi to 40 to 60 years for the CSC I convictions, 14 ½ to 22 ½ years for the CSC II convictions, and two to three years for the CSC IV convictions.

Fathi argues that the trial court erred in relying on the number of sexual assaults and the psychological trauma to the victims as a reason to depart because upward departures may not be based on characteristics already taken into account by the guidelines. With respect to the trial court's remaining reasons—Fathi's disgusting and revolting behavior, the likelihood that he would re-offend, and his dangerousness—Fathi contends that these reasons are not objective,

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[91] MCL 777.40(1)(a).

[92] MCL 777.43.

[93] MCL 777.49(c).

[94] MCL 777.62. The guidelines for the CSC II convictions are 50 to 125 months, and for CSC IV, 2 to 21 months (both at habitual offender level 2).

verifiable reasons for departure. Additionally, Fathi argues that the trial court failed to fulfill its obligation to articulate a substantial and compelling reason for the *particular* departure it imposed and why the length of the upward departure actually imposed was proportionate. We conclude that there were substantial and compelling reasons for the trial court to depart from the guidelines, which the trial court articulated on the record.

The number of assaults suffered by the victims, S.S. in particular, was a substantial and compelling reason for departure. Fathi, who was a trusted friend of the family, and whom S.S. thought of as an uncle, abused S.S. over a two-year period of time. Moreover, Fathi told S.S. that harm would come to his family if he told what happened. Thus, "[t]his fact is of considerable worth in determining [the] defendant's minimum sentence. Also, it is a fact that does not exist in all [CSC] cases."[95] Further, although psychological injury is already taken into account in the sentencing guidelines,[96] we find no clear error in the trial court's determination that the depth of such injury was not given adequate or disproportionate weight.

With respect to the trial court's fourth reason for departure—the fact that Fathi's behavior was disgusting and revolting, he engaged in predatory behavior, and he is a danger to society—"[a]lthough a trial court's 'belief' that a defendant is a danger to himself and others is not in itself an objective and verifiable reason, objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an acceptable justification for an upward departure."[97] In this case, the sheer number of victims, beginning with a female victim (F.C.) in 1991, and progressing to V.O, N.T., S.S., C.C., and then additional victims in Sweden, as well as the similar pattern of the assaults (choosing young male victims, luring them with video games, providing them with expensive gifts, or resorting to force or threats of force) provides objective and verifiable evidence of Fathi's propensity for recidivism. Thus, the trial court here satisfied the initial burden of articulation of substantial and compelling reasons to depart from the guidelines.

We also conclude that the trial court's departure of 11 years was proportionate to the seriousness of Fathi's pervasive conduct. Fathi sexually assaulted numerous minors for years. We find no error in the trial court's reasonable inference from the record that Fathi's predatory pattern of behavior clearly evidenced that he is highly likely to re-offend and that he a danger to society.[98] The sentence was proportionate to the seriousness of Fathi's conduct.[99] "[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment."[100]

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[95] *Smith*, 482 Mich at 301.

[96] MCL 777.34(1)(a).

[97] *Horn*, 279 Mich App at 44-45.

[98] See *Petri*, 279 Mich App at 422.

[99] See *Smith*, 482 Mich at 304-305.

[100] *Babcock*, 469 Mich at 263.

2. CONSIDERATION OF SWEDISH CONVICTION

Fathi argues that the trial court should not have considered his Swedish conviction without a showing that it was obtained in a constitutionally permissible manner and contends that no other country's system incorporates the due process rules that have been deemed necessary in the United States.

It is true that a trial court may consider convictions from other jurisdictions, as long as the court is convinced that the defendant was afforded due process in that system.[101] Foreign convictions, specifically, "may be considered in sentencing, subject to the requirement of a showing on a case-by-case basis that the criminal justice system of the country in question provided defendant with sufficient due process safeguards."[102]

Here, however, the trial court did not explicitly consider the Swedish *conviction* when articulating its reasons for departure. Specifically, the trial court stated, "The sentence guidelines do not take into account [Fathi]'s assault of children in Sweden. [Fathi] continued his *deviant conduct* during his flight from justice, which makes him a threat to all children." Clearly, the trial court focused its rationale on the recidivistic and relentless nature of Fathi's conduct—that is, that even when on the run from law enforcement, he persisted in continuing his assaultive behavior. The fact of his conviction was irrelevant.

In sum, we conclude that the trial court did not abuse its discretion in its upward departure from the sentencing guidelines.

III. FATHI'S STANDARD 4 BRIEF

Fathi raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None of these issues have merit.

A. PROSECUTORIAL MISCONDUCT

1. STANDARD OF REVIEW

Fathi argues that the prosecutor committed misconduct by offering perjured testimony. Fathi did not object at trial and therefore review of his prosecutorial misconduct claim is "limited to ascertaining whether plain error affected Fathi's substantial rights."[103]

2. LEGAL STANDARDS

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and

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[101] *People v Galvan*, 226 Mich App 135, 137 n 1; 572 NW2d 49 (1997).

[102] *People v Gaines*, 129 Mich App 439, 449; 341 NW2d 519 (1983).

[103] *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

impartial trial."[104] This Court considers issues of prosecutorial misconduct "on a case-by-case basis[.]"[105] Curative instructions, however, "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements."[106]

3. APPLYING THE STANDARDS

Fathi specifically argues that the prosecutor committed misconduct by offering perjured testimony from C.C., Officer Bergman, S.S., D.T., and V.O. Fathi asserts, first, that C.C. changed his testimony on cross-examination when asked whether he identified Fathi with prompting by police. Second, Fathi alleges that Officer Bergman committed perjury when she testified that she never pointed out Fathi's photograph in the last photo lineup. Third, according to Fathi, S.S. offered false testimony when he stated that he was molested 40 times in Auburn Hills when it was actually Pontiac, and then went on to state that the assaults happened 30 times in Oak Park but never told his parents or anyone else what happened. Fourth, Fathi contends that V.O. lived with Fathi for five years and told the police that he was not a victim. Finally, Fathi asserts that D.T. claimed that his cousin walked in the front door while he was being assaulted in the bedroom, and yet D.T. did not yell out or tell anyone. Moreover, he waited eight years to tell anyone.

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath."[107] "Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, and that a prosecutor has a duty to correct false evidence."[108] Nevertheless, "the prosecutor's failure to correct false testimony does not automatically require reversal. A new trial is required only if the false testimony could in any reasonable likelihood have affected the judgment of the jury."[109]

Fathi does not offer any evidence that the alleged testimony was false, but rather, his arguments are simply that the witnesses' testimony was either inconsistent or incredible. Further, there is no indication in the record, that, even if any of the witnesses testified falsely, the prosecutor knew they would testify falsely.[110] Moreover, the jury heard all of the alleged inconsistencies and incredible testimony, and was instructed by the trial court: "You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of a

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[104] *Dobek*, 274 Mich App at 63.

[105] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[106] *Unger*, 278 Mich App at 235.

[107] *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

[108] *Id*.

[109] *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998).

[110] *Herndon*, 246 Mich App at 417.

person's testimony." Thus, Fathi cannot show that the false testimony affected the jury's judgment because "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors."[111]

B. EFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

Fathi argues that he received ineffective assistance of counsel. Because the trial court did not hold an evidentiary hearing, "our review is limited to errors apparent on the record."[112]

2. LEGAL STANDARDS

Generally, to establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable."[113]

3. APPLYING THE STANDARDS

Fathi argues that trial counsel was ineffective, first, for failing to speak to Heithem Fathi, Amy Fathi, Rita Malki, Tony Boscarino, and an individual identified simply as "Cirprian," who would testify that they showed up unannounced at Fathi's home but did not notice any inappropriate conduct. Second, Fathi argues that his defense counsel was ineffective because Fathi told him that, while being escorted from a holding cell in the Oakland County Courthouse, he walked past Judge Andrews, who said, "you'd better listen" to your lawyer. Nevertheless, upon being informed of this event, defense counsel merely told Fathi not to worry about it and made no inquiry on the record to determine what happened.

Because our review is limited to facts on the record,[114] there is no evidence that Fathi suggested defense counsel interview any particular witnesses and no affidavits outlining their proposed testimony. Regardless, "[d]ecisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy."[115] Thus, "[i]n order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant."[116] Here, Fathi fails to make any such showing. Similarly, there is no record evidence that Fathi informed

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[111] *Chapo*, 283 Mich App at 370.

[112] *Seals*, 285 Mich App at 16.

[113] *Odom*, 276 Mich App at 415, citing *Strickland*, 466 US at 694.

[114] *Seals*, 285 Mich App at 16.

[115] *People v Bass* (*On Rehearing*), 223 Mich App 241, 252-253; 565 NW2d 897 (1997).

[116] *Id.* at 253.

counsel that the trial court initiated an improper ex parte communication. "[C]ounsel cannot be found ineffective for failing to pursue information that his client neglected to tell him."[117]

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[117] *McGhee*, 268 Mich App at 626.