STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2010
v	No. 291520 Wayne Circuit Court
KAREEM CLINNON WATKINS, Defendant-Appellant.	LC No. 08-011399-FC

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), two counts of second-degree CSC, MCL 750.520c(1)(a), and two counts of disseminating sexually explicit matter to a minor, MCL 722.675. Defendant was sentenced to 29 to 50 years' imprisonment for each first-degree CSC conviction, 15 to 22 years' imprisonment for each second-degree CSC conviction, and two to three years' imprisonment for each distribution of sexually explicit matter to a minor conviction. Defendant was sentenced as a second habitual offender. See MCL 769.10. We affirm.

Defendant first argues that the trial court erred in admitting testimony under MCL 768.27a without first determining whether the testimony's probative value outweighed its prejudicial effect under MRE 403. We agree, but find the error harmless.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion and reviews de novo the proper interpretation of a statute or rule of evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). In a criminal case, if error is found, reversal is not required unless the defendant meets his or her burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error, meaning the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MCL 768.27a(1) provides:

> Notwithstanding section 27, 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.

Under MCL 768.27a, if a defendant is accused of committing a listed offense against a minor, the prosecution may present evidence that the defendant committed another listed offense against a minor without justifying the admissibility of the evidence under MRE 404(b).[1] *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007); *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). Furthermore, such prior-acts evidence may be admitted for any relevant purpose, including proof of the defendant's propensity to commit the charged offense. *Watkins*, 277 Mich App at 364; *Pattison*, 276 Mich App at 619; MCL 768.27a. However, the trial court must still determine whether evidence that is admissible under MCL 768.27a should nevertheless be excluded under MRE 403.[2] *Pattison*, 276 Mich App at 620-621. Thus, in this case, the trial court improperly determined that it had no discretion to exclude J.S.'s testimony concerning defendant's prior acts against minors under MRE 403.

The trial court's error, however, was harmless. The probative value of J.S.'s testimony outweighed the danger of any unfair prejudice to defendant. The prior-acts evidence introduced by J.S. tended to highlight defendant's propensity to engage in sexual acts with minors and bolstered the credibility of both victims by showing defendant engaged in similar acts. The testimony was highly probative and did not pose any danger of prejudice beyond that which normally accompanies testimony admitted under MCL 768.27a. Thus, the trial court's failure to complete a MRE 403 analysis was harmless. See *Lukity*, 460 Mich at 495-496.

Defendant also argues that there is insufficient evidence to uphold his convictions. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). "In reviewing the sufficiency of the evidence, this Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of first-degree CSC are (1) the defendant engaged in sexual penetration with another person, and (2) that other person is under 13 years of age. MCL 750.520b(1)(a).

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[1] MRE 404(b)(1) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

[2] MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"'Sexual penetration' means 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." MCL 750.520a(r). The elements of second-degree CSC are (1) the defendant engaged in sexual contact with another person and (2) that other person is under 13 years of age. MCL 750.520c(1)(a). Sexual contact is the "intentional touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (*i*) Revenge. (*ii*) To inflict humiliation. (*iii*) Out of anger." MCL 750.520a(q). Finally, the pertinent elements of disseminating sexually explicit material to a minor are (1) the defendant knowingly disseminated to a minor (2) sexually explicit visual material (3) that is harmful to minors. MCL 722.675(1)(a).

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. The first victim testified that defendant penetrated her mouth and anus with his penis, he rubbed his penis on her buttock, rubbed his hands on her stomach and back, and rubbed a vibrator over her buttock, stomach, back, and leg. The first victim also testified that defendant showed her a video, entitled "Black Booty," where a man was putting his penis into a woman's anus and the cover of the video depicted a man's penis inserted into a woman's mouth. The second victim testified that she saw defendant's penis inside the first victim's mouth and defendant touched the second victim's buttock with his hand. The second victim also testified that defendant showed her a video where a man was putting his penis into a woman's anus. The victims, who were ten years old at the time of trial, testified to sexual events that occurred when they were approximately seven to nine years old. The testimony of a victim alone, without corroborating evidence, can constitute sufficient evidence to establish a defendant's guilt under MCL 750.520b and 520c. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998). Here, the victim's testimonies are sufficient to uphold defendant's convictions.

Additionally, the jury was presented with the testimony of J.S. that defendant rubbed her vagina while she was sleeping when she was approximately nine years old. As previously discussed, pursuant to MCL 768.27a, this evidence bolstered both victims' credibility and allowed the jury to infer that defendant had a propensity to commit similar offenses. Thus, a reasonable jury would be able to convict defendant. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant next argues that the length of his sentences is cruel and unusual punishment. We disagree. We review unpreserved sentencing errors for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id*.

The United States Constitution prohibits inflicting cruel and unusual punishment upon a defendant convicted of a charged offense, and the Michigan Constitution prohibits cruel or unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16; see *People v Powell*, 278

Mich App 318, 323; 750 NW2d 607 (2008). However, a sentence within the minimum statutory guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual. *Powell*, 278 Mich App at 323. Defendant does not claim error in the calculation of his sentencing guidelines and admits that his sentences are proportionate. Thus, defendant's sentences are not cruel or unusual punishment on this basis.

Defendant argues that his sentences are cruel and unusual punishment because the evidence against him was insufficient and unreliable and, because he is 34 years old, a minimum sentence of 29 years will effectively result in a life sentence. As previously discussed, the evidence was sufficient to uphold defendant's convictions. Furthermore, as stated by the Supreme Court in *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997) (emphasis in original):

> [W]e find no basis . . . for [requiring] that the trial judge tailor every defendant's sentence in relationship to the defendant's age. Persons who are sixty years old are just as capable of committing grievous crimes as persons who are twenty years old. We find no principled reason to *require* that a judge treat similar offenses that are committed by similarly depraved persons differently solely on the basis of the age of the defendant at sentencing where the Legislature has authorized the judge to impose life or *any* term of years.

Therefore, a defendant's age is not a factor the trial court must account for when determining a minimum sentence. Because sufficient evidence existed for defendant's sentences and defendant's age did not have to be accounted for in determining his sentences, the sentences are not cruel or unusual punishment.

In his standard 4 brief, defendant first argues ineffective assistance of counsel on several bases. This issue is abandoned. In his brief, defendant failed to identify which witnesses defense counsel failed to interview, what defense strategy he failed to employ, which defense witnesses he failed to call to testify, and which witnesses on the prosecution's witness list he failed to locate. Defendant also failed to explain what error he is claiming in defense counsel's failure to "interview" defendant. "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); see *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue."). Thus, defendant has abandoned these contentions of ineffective assistance of counsel on appeal. Additionally, defendant's other contentions of ineffective assistance of counsel, including defense counsel's failure to properly impeach J.S., failure to properly cross-examine Dr. Lisa Markman, and failure to present additional relevant evidence, are also abandoned because defendant failed to engage in a meaningful analysis of those claims. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) (holding that because the defendant failed to support his claim with any meaningful analysis, the issue was abandoned).

Regardless, the record provides no basis for concluding that defendant was denied a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel competently cross-examined each of the prosecution's witnesses, presented several

witnesses on behalf of defendant, and defendant took the stand in his own defense. Defense counsel could have had numerous reasons for selecting which witness to call, how to question them, and what evidence to present to the jury, including the need to maintain consistency in the theory that defendant was innocent because both victims were not credible witnesses. Defendant has not overcome the presumption that counsel's actions constituted sound trial strategy, and thus, defendant has not established that a new trial is warranted. See *id*. Furthermore, given the evidence against defendant, as previously discussed, any deficiency in counsel's performance did not prejudice defendant. Therefore, counsel was not ineffective on any of these bases.

Defendant next argues that prosecutorial misconduct occurred during his trial. This issue is also abandoned on appeal. Defendant inadequately briefed this issue, providing less than cursory treatment of the issue in his appellate brief, and his assertions of prosecutorial misconduct are vague and unsupported by citation to the record. Again, "'[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *Watson*, 245 Mich App at 587; see *Harris*, 261 Mich App at 50.

Defendant's final argument in his standard 4 brief is that he is entitled to a new trial because he took and passed a polygraph test. We disagree. The failure to seek a new trial in a posttrial motion for a new trial limits review to plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Defendant asserts that he took and passed a polygraph test before the beginning of his jury trial. As defendant acknowledges in his brief, the results of a polygraph examination are inadmissible at trial because the scientific community does not generally accept polygraph tests as reliable. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985), citing *People v Barbara*, 400 Mich 352, 377; 255 NW2d 171 (1977). However a trial court may, under limited circumstances, consider polygraph examination results when ruling on a motion for a new trial. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). Polygraph test results may be considered in the context of a motion for a new trial "to buttress the credibility of new witnesses, the evidentiary value of whose testimony satisfies traditionally strict criteria for ordering a new trial." *Barbara*, 400 Mich at 359. Thus, when the only evidence proffered in support of the motion is the results of a polygraph examination, which are inadmissible at trial, there is not a sufficient basis for granting a new trial. Defendant is not entitled to a new trial merely because he took and passed a polygraph test. Furthermore, given that there was sufficient evidence to prove defendant committed the crimes for which he was convicted, as previously discussed, there is no resulting prejudice to defendant.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering