

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD JAMES SLEEPER,

Defendant-Appellant.

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UNPUBLISHED

January 12, 2016

No. 323860

Ingham Circuit Court

LC No. 13-001113-FH

Before: RONAYNE KRAUSE, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of six counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). The trial court sentenced defendant to concurrent prison terms of 120 months to 180 months. Defendant appeals as of right. We affirm defendant's convictions, but remand for further sentencing proceedings consistent with *People v Steanhouse*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2015).

I. OTHER ACTS EVIDENCE

Defendant first argues that the trial court improperly admitted evidence of his other acts of criminal sexual conduct with minors. We review a trial court's decision to admit evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). An abuse of discretion occurs when the court chooses an outcome outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 768.27a(1) provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The listed offenses include various forms of criminal sexual conduct. *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007). MCL 768.27a permits a prosecutor to introduce evidence of a defendant's commission of another listed offense against a minor without justifying its admissibility under MRE 404(b). *People v Buie*, 298 Mich App 50, 74; 825 NW2d 361 (2012).

Pursuant to MCL 768.27a(1), the trial court permitted evidence of defendant's criminal sexual conduct with respect to RK, who was in the same grade as complainant and who testified

that when she was 15 years old, defendant touched her breasts, touched her groin and chest over her clothes, and kissed her. There was also testimony regarding the context of defendant's sexual contact with RK and complainant, including evidence that defendant used social media to communicate with the girls, attempted to meet them at school, and gave them gifts.<sup>1</sup> Defendant's acts of sexual contact with RK would constitute fourth-degree sexual misconduct under MCL 750.520e(1)(a), which is a listed offense for purposes of MCL 768.27a(1).<sup>2</sup> Defendant does not argue that the evidence was irrelevant or failed to meet the definition of a listed offense under MCL 768.27a, but rather that it was inadmissible under MRE 404(b). Because MCL 768.27a supersedes MRE 404(b), *People v Watkins*, 491 Mich 450, 476-477; 818 NW2d 296 (2012), the trial court did not abuse its discretion by refusing to exclude the evidence under MRE 404(b).

Defendant asserts that the evidence was substantially more prejudicial than probative. Evidence that is admissible under MCL 768.27a may nonetheless be excluded under MRE 403 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." Unfair prejudice exists if there is a tendency that the jury will give the evidence undue or preemptive weight. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). Evidence is unfairly prejudicial if it goes beyond the merits of the case to inject issues other than a defendant's guilt. *People v McGhee*, 268 Mich App at 614. In *Watkins*, 491 Mich at 487-488, our Supreme Court provided the following considerations for assessing whether evidence admissible under MCL 768.27a is unfairly prejudicial:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.

In this case, the other acts evidence pertained to defendant's conduct that was similar to and proximate in time to the charged crimes. The evidence demonstrated that complainant was

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<sup>1</sup> Evidence concerning the context of a defendant's commission of a listed offense against a minor may be properly admitted under MCL 768.27a. See *Buie*, 298 Mich App at 73 (affirming a trial court's decision to admit testimony under MCL 768.27a describing that "the manner in which the sexual assaults occurred in both instances w[as] similar"); see also *People v Watkins*, 491 Mich 450, 490; 818 NW2d 296 (2012) (affirming a trial court's decision to admit evidence under MCL 768.27a "regarding the other acts of alleged criminal sexual conduct and their surrounding circumstances").

<sup>2</sup> MCL 768.27a(2)(a) defines "listed offense" to mean "that term as defined in [MCL 28.722]." MCL 28.722(j) defines "listed offense" to include "a tier I, tier II, or tier III offense," and defines a tier II offense to include "[a] violation of section 520c, 520e, or 520g(2) of the Michigan penal code . . . committed against an individual 13 years of age or older but less than 18 years of age." MCL 28.722(u)(x).

truthful because defendant behaved in a similar manner with another girl her age. Further, the evidence established defendant's contact with complainant's peer group, and included several references to defendant's sexual conduct with complainant. Because defendant discussed his actions toward complainant with RK, the other acts evidence was intertwined with evidence of the charged crimes. The evidence was also consistent with and provided context for the charged conduct, so it was not unfairly prejudicial. Additionally, there was no danger of confusing the issues, misleading the jury, undue delay, or other factors that would require exclusion of the evidence under MRE 403. The trial court did not abuse its discretion by admitting the evidence.<sup>3</sup>

## II. PROSECUTORIAL ERROR

Next, defendant argues that he was denied due process and a fair trial due to the prosecutor's misconduct. Defendant did not object to the prosecutor's conduct or request a curative instruction below, so our review is limited to plain error affecting substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is only warranted if the plain error resulted in the conviction of an innocent defendant or seriously affected the integrity, fairness, or public reputation of the judicial proceedings. *People v Unger (On Remand)*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

The test for prosecutorial error is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Reviewing courts must examine the entire record and evaluate a prosecutor's remarks in context. *Dobek*, 274 Mich App at 64. The opportunity for a fair trial may be jeopardized if the prosecutor interjects issues into the case beyond a defendant's guilt or innocence. *Id.* at 63-64.

Defendant argues that the prosecutor unfairly presented evidence characterizing his conduct as "grooming" behavior. At trial, the prosecutor asked Detective Shannon Thielen to describe grooming behavior, which she explained was conduct progressively testing a child's tolerance for an inappropriate relationship or physical touch. Thielen testified that defendant's Facebook messages with RK were consistent with grooming behavior. In *People v Petri*, 279 Mich App 407, 415-417; 760 NW2d 882 (2008), this Court held that an officer could permissibly provide a definition of "grooming" behavior and apply it to a defendant's behavior as a lay person. Therefore, defendant has not shown that the prosecutor erred by eliciting this testimony.

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<sup>3</sup> Defendant additionally states that he was denied due process and a fair trial because of the admission of the other acts evidence. "To be consistent with due process, the other crime must be 'rationally connected' with the charged crime." *Manning v Rose*, 507 F 2d 889, 894 (CA 6, 1974). Likewise, "[a]s long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." *United States v LeMay*, 260 F3d 1018, 1026 (CA 9, 2001). The other acts here were similar to the charged conduct. Therefore, defendant has not demonstrated that his due process rights were violated.

Defendant next argues that the prosecutor improperly vouched for the complainant's credibility by using the word "victim" to describe her. A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). In this case, the prosecutor's use of the term "victim" did not speak to the complainant's truthfulness.

At trial, the prosecutor asked a witness which name represented "the victim" among a list of Facebook friend requests, and objected to a line of questioning by stating that it had "nothing to do with the victim." The prosecutor also referred to complainant as a "potential victim" during closing argument while describing defendant's actions toward her before the abuse began. The prosecutor argued that defendant did not share a father-daughter relationship with complainant, but rather a romantic relationship, "[e]xcept she was not his lover; she is his victim." The prosecutor also explained the elements of count five by stating that the act involved was "oral sex, the defendant giving oral sex to the victim." None of the prosecutor's references interjected issues beyond the defendant's guilt or innocence, or improperly bolstered the complainant's testimony. In addition, describing the complainant as "the victim" was consistent with the prosecution's theory of the case and therefore did not unduly prejudice the defendant. Accordingly, defendant has not demonstrated that the conduct amounted to prosecutorial error.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel provided ineffective assistance. We review unpreserved claims of ineffective assistance for errors apparent on the record. *Unger*, 278 Mich App at 253. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error and constitutional questions de novo. *Id.*

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. The right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's errors, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The effective assistance of counsel is presumed, and a defendant bears the heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant first argues that his trial counsel was ineffective for failing to object to the prosecutor's alleged acts of error. As discussed above, none of the prosecutor's acts amounted to prosecutorial error. Defendant's counsel cannot be deemed ineffective for failing to raise a futile objection. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007).

In his Standard 4 brief,<sup>4</sup> defendant raises several additional instances of alleged ineffective assistance. First, defendant argues that his counsel was ineffective for failing to investigate evidence, namely, all DNA testing performed by the prosecutor. Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App at 626. However, defendant does not identify what DNA or other evidence his counsel failed to investigate. Before trial, defendant's counsel requested the results of DNA testing that was performed to determine whether defendant was complainant's biological father, such that he could be charged with first-degree criminal sexual conduct rather than CSC III. Accordingly, defendant's counsel investigated DNA evidence and apparently knew the results because defendant was only charged with CSC III. Moreover, it is not clear how further investigation of the DNA evidence could have aided defendant because the evidence could only have been used to increase the severity of the charges against him.

Second, defendant argues that his counsel failed to prepare, leading to a lack of representation, including at the arraignment hearing. Defense counsel's duty is to prepare, investigate, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might have altered the outcome of the trial. *People v Chappo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The attorney that represented defendant at the arraignment hearing helped him enter a plea of not guilty, but then requested that he be replaced due to a breakdown in the attorney-client relationship. Defendant does not explain how the actions of either of his attorneys deprived him of a substantial defense. Therefore, there is no factual support for defendant's claim.

Third, defendant argues that his trial counsel failed to object to or cross-examine witnesses who testified that the crimes happened at different times, denying defendant an alibi defense. We presume that decisions regarding the cross-examination of witnesses are a matter of trial strategy. *Ayres*, 239 Mich App at 23. "An information is required to contain the 'time of the offense as near as may be'; however, '[n]o variance as to time shall be fatal unless time is of the essence of the offense.'" *Dobek*, 274 Mich App at 82-83, quoting MCL 767.45(1)(b). "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *Dobek*, 274 Mich App at 83.

During cross-examination, defendant's counsel did not ask the complainant about specific dates of sexual abuse beyond a general time period between March 2012 and July 2013. However, since a general timeframe was allowed, counsel could have reasonably determined that nothing would be gained by highlighting that complainant did not pinpoint specific dates. Accordingly, defendant has not demonstrated that his trial counsel's questioning was deficient.

Fourth, defendant states that his trial counsel was deficient for failing to seek an interlocutory review of evidence rulings; however, defendant does not specify what evidence was errantly admitted or what rulings should have been appealed. "The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *People v Douglas*, 496

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<sup>4</sup> Administrative Order No. 2004-6, Standard 4.

Mich 557, 592; 852 NW2d 587 (2014). Defendant has not demonstrated any grounds on which evidence could have been found inadmissible, and counsel was not ineffective for failing to pursue a fruitless interlocutory appeal.

Defendant's next two claims are that his trial counsel was deficient for failing to present evidence of his Facebook account or to impeach witnesses. Prejudice may result when trial counsel fails to introduce evidence that would impeach a witness and corroborate the defendant's testimony. *People v Trakhtenberg*, 493 Mich 38, 57; 826 NW2d 136 (2012). Defendant fails to explain how evidence of his Facebook account would have "defeated the prosecution's argument of grooming," or what evidence of bias or impeachment could have been elicited by his trial counsel. Therefore, defendant has failed to establish the factual predicate of his claim.

Seventh, defendant contends that his trial counsel was deficient for failing to object to the statements of child witnesses under MRE 602, which provides in part that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Defendant does not identify which witnesses lacked personal knowledge or which facts were not personally known by the witnesses. Accordingly, defendant has not established the factual predicate of his claim.

Finally, defendant asserts that his trial counsel should have objected to the use of an incorrect sentencing grid in calculating his sentence. As discussed below, the trial court consulted the proper sentencing grid. Counsel was not ineffective for failing to make a futile objection. *Archer*, 277 Mich App at 84. In sum, defendant has not shown that his counsel provided ineffective assistance.

#### IV. SENTENCING

Finally, defendant argues that the trial court improperly departed from his sentencing guidelines range without articulating substantial and compelling reasons for the departure. In *People v Lockridge*, 498 Mich 358, 379; 870 NW2d 502 (2015), the Michigan Supreme Court held that Michigan's determinate sentencing scheme violated the rules of *Apprendi*<sup>5</sup> and *Alleyne*<sup>6</sup> because the sentences recommended by the sentencing guidelines relied on judicial fact-finding to compel an increase in a defendant's mandatory minimum sentence. The Court held that "to the extent that OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's 'mandatory minimum' sentence, that procedure violates the Sixth Amendment." *Id.* at 373-374.

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<sup>5</sup> In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court held that under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

<sup>6</sup> In *Alleyne v United States*, \_\_\_ US \_\_\_, \_\_\_; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013), the Court found that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" and found beyond a reasonable doubt.

To remedy the constitutional violation, the Court held that the sentencing guidelines are advisory only, and struck down the requirement in MCL 769.34(3) “that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure.” *Id.* at 364-365. To preserve the legislative intent behind the guidelines, however, the Court held that “a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence.” *Id.* at 365.

In his Standard 4 brief, defendant argues that the trial court determined his minimum sentencing guidelines range by utilizing an incorrect sentencing grid. He argues that the trial court’s departure sentence was more severe than intended because of the mistake. Defendant was convicted of CSC III, MCL 750.520d, which he maintains is a class C felony, while the trial court used the sentencing grid for class B felonies. According to MCL 777.16y, CSC III is a class B felony. Therefore, the trial court did not reference an improper sentencing grid.

Defendant argues that he is entitled to resentencing because he did not admit to the facts underlying the scoring of offense variables (OVs) 4 and 10, and they were not established by the jury. Defendant did not “object to the scoring of the OVs at sentencing on *Apprendi/Alleyne* grounds, so our review is for plain error affecting substantial rights.” *Lockridge*, 498 Mich at 392. Even if we assume that the facts necessary to score OV 4 and OV 10 were not admitted by defendant or established by the jury, defendant cannot establish plain error. In *Lockridge*, the Supreme Court explained that because the defendant

received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), the defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne*. [*Id.* at 394.]

Under *Lockridge*, 498 Mich at 392, we must review defendant’s sentence for reasonableness. In *People v Steanhouse*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2015), this Court held that a departure sentence should be remanded for analysis under the procedures outlined in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), to determine whether the trial court’s departure constituted plain error because the trial court was not aware of or bound by the reasonableness standard at the time the sentence was imposed. Accordingly, we remand this matter to the trial court to follow the *Crosby* procedure pursuant to this Court’s decision in *Steanhouse*.

Defendant’s convictions are affirmed, but we remand for further sentencing proceedings pursuant to *Steanhouse*.

/s/ Amy Ronayne Krause  
/s/ Michael F. Gadola  
/s/ Colleen A. O'Brien