# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 15, 2016 |
| v | No. 324693<br>Muskegon Circuit Court |
| RICHARD ALLEN MINOR,<br><br>Defendant-Appellant. | LC No. 13-063397-FH |

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his conviction of one count of third-degree criminal sexual conduct ("CSC III"), MCL 750.520d.[2] He was sentenced, as a fourth habitual offender, MCL 769.12, to 19 to 37 years' imprisonment. We affirm defendant's conviction, but remand for further proceedings consistent with this opinion.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In August 2011, the 16-year-old victim, who is defendant's daughter, was living in Grand Rapids, Michigan, with her grandmother. The victim had not seen defendant for a period of time, but she had spoken with him on the phone. Defendant had made some suggestive comments during their telephone conversations for some time, which led the victim to stop taking his calls. As time went on, she ultimately decided that she wanted to see her father.

[1] *People v Minor*, unpublished order of the Court of Appeals, entered March 26, 2015 (Docket No. 324693).

[2] Defendant was charged with alternative counts of CSC III under MCL 750.520d(1)(d) (sexual penetration with a person who is related to defendant), and MCL 750.520d(1)(b) (sexual penetration with force or coercion). The jury's verdict did not specify the particular theory under which defendant was convicted. Later, the trial court granted the prosecution's post-trial motion to amend the information so that Count 1 of the felony information consisted of one count of CSC III based upon multiple variables.

On August 10, 2011, defendant, his wife, and the victim's half-sister picked up defendant's 16-year-old daughter from her work. After making a few stops, the victim called her grandmother to see if it was okay for her to visit defendant's residence in Muskegon, Michigan. With the grandmother's permission, the group traveled to defendant's residence, where they watched a movie in defendant's bedroom. According to the victim, while viewing the movie, defendant made the victim touch his genitals.

Later that evening, the victim went downstairs to use the restroom. As she exited the bathroom, defendant's wife entered. The victim then walked past defendant so that she could return upstairs where they had been watching the movie. As she passed the defendant, he told her not to say anything to anyone and that "stuff was gonna happen" to her if she did. He then placed his hands inside of her pants and underwear, inserting his hand into her vagina. When defendant heard his wife flush the toilet and exit the restroom, he stopped touching the victim, started pushing the victim upstairs, and told the victim to stay upstairs. Later, defendant came upstairs, at which time he told the victim to pull down her pants because "he wanted to stick his penis in." The victim refused, and defendant instructed her not to tell anyone about the incident. Later that night, defendant's wife took the victim back to Grand Rapids.

A day or two later, defendant called the victim and asked her if she liked what had happened. The victim replied in the negative.

The victim testified at trial that she did not disclose the incident for a couple of months because she was afraid to tell anyone. She explained that she did not want to put herself or her family in danger.

According to the victim, defendant called her around her 17th birthday in February and tried to wish her a happy birthday, but she was with her friends and unable to speak with him. The victim testified that defendant became angry because she was not paying attention to him, so he stated that she was not his child, that she was not "supposed to be [t]here," that she was a whore, and that he was "gonna treat [her] like he treats the whore on the street."

Ultimately, the victim told her sister and her grandmother about the episode at defendant's residence.[3] Shortly after the victim told her grandmother, the victim went with her mother and grandmother to report the incident to the police.

Defendant eventually was arrested and charged with alternative counts of CSC III for his digital-vaginal penetration of the victim. Count one alleged CSC III under MCL 750.520d(1)(d) (sexual penetration with a person who is related to defendant), and count two alleged CSC III under MCL 750.520d(1)(b) (sexual penetration with force or coercion).

At trial, defendant confirmed that he picked up the victim from work and brought her back to his residence with his wife and the victim's half-sister, at which time the group watched

[3] At trial, her grandmother testified that the victim only told her that "[defendant] was trying to put his hands down her pants."

a movie. Contrary to the victim's testimony, however, he denied any sexual contact with the victim. He also denied threatening the victim.

Defendant was convicted of one count of CSC III. As indicated *supra*, the jury's verdict did not specify the particular theory under which defendant was convicted. However, the felony information was later amended so that Count 1 consisted of one count of CSC III based upon multiple variables. He now appeals by delayed leave granted.

## II. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecutor engaged in misconduct by threatening or intimidating his wife, a potential witness. We disagree.

### A. STANDARD OF REVIEW

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant failed to preserve this claim by timely objecting. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *Unger*, 278 Mich App at 234-235. We review unpreserved issues of prosecutorial misconduct for plain error affecting substantial rights. *Bennett*, 290 Mich App at 475-476, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476 (quotation marks and citations omitted; alteration in original).

We review prosecutorial misconduct claims on a case-by-case basis, examining the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010); *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007).

### B. ANALYSIS

A defendant has a constitutional right to call witnesses to testify in his defense. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 20. Additionally, "[i]t is well settled that a prosecutor may not intimidate witnesses in or out of court." *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001). "Attempts by the prosecution to intimidate witnesses from testifying, if successful, amount to a denial of a defendant's constitutional right to due process of law." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). "However, a prosecutor may inform a witness that false testimony could result in a perjury charge." *Layher*, 238 Mich App at 587. Cf. *People v Robbins*, 131 Mich App 429, 440; 346 NW2d 333 (1984) (stating that as long as strong and threatening language has not been used,

"warnings to potential defense witnesses concerning self-incrimination or possible perjury charges have been held to be proper"). Notably, "under certain circumstances, the prosecutor, as an officer of the Court, has a duty to inform the Court that it may be necessary for the Court to inform a witness of his rights under the Fifth Amendment." *People v Callington*, 123 Mich App 301, 306-307; 333 NW2d 260 (1983).

Here, the defendant's complaint centers on when the prosecutor merely informed the trial court and defendant on the record that there were some potential concerns that defendant and his wife may open themselves up to charges on the basis of perjury or providing false information to the police in the course of investigating a felony. These statements were permissible and reflect a good-faith attempt to inform the trial court of the prosecutor's conversations with defense counsel and the possible implications of defendant's testimony. See *Layher*, 238 Mich App at 587. In addition, there is no record evidence that the prosecutor spoke directly with defendant's wife regarding the possibility of perjury or providing false information charges, or that the prosecutor had *any* contact with defendant's wife.[4] Cf. *People v Pena*, 383 Mich 402, 404-406; 175 NW2d 767 (1970) (a case in which the prosecutor had direct, impermissible contact with a defense witness).

On this record, defendant has failed to establish that the prosecution committed a plain error affecting his substantial rights. See *Carines*, 460 Mich at 763; *Bennett*, 290 Mich App at 475-476.

## III. PRIOR CONSISTENT STATEMENTS

Next, defendant argues that the trial court erred in admitting into evidence prior consistent statements of the victim under MRE 801(d)(1)(B). Although we agree with defendant that testimony was improperly admitted, the admission of this evidence was harmless.

### A. STANDARD OF REVIEW

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1). Defendant preserved his claim regarding the grandmother's testimony by asserting a timely objection on hearsay grounds at trial, which the trial court ultimately overruled on the basis of MRE 801(d)(1)(B). We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion, *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010), which "occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes," *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). We

[4] The affidavit that defendant attached to his brief on appeal is not a part of the lower court record. Accordingly, we decline to consider it, as it constitutes an impermissible expansion of the record on appeal. See MCR 7.210(A)(1); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

review *de novo* preliminary questions of law, such as whether a rule of evidence precludes admission. *Mardlin*, 487 Mich at 614.

However, defendant failed to preserve his claim regarding the detective's reference to a prior consistent statement made by the victim. See *Aldrich*, 246 Mich App at 113. We review unpreserved claims for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

B. ANALYSIS

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible, except as provided by the rules of evidence. MRE 802. Although an out-of-court statement, "[t]he admission of a prior consistent statement through a third party is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied." *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). MRE 801(d) provides, in relevant part:

> (d) Statements which are not hearsay. A statement is not hearsay if–
>
> (1) Prior statement of witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

In *Jones*, 240 Mich App at 706-707, this Court held that the party offering a prior consistent statement must establish four elements:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [Quotation marks and citation omitted.]

"[T]he motive in the second element must be the same motive in the fourth element of the four-pronged test to admit a prior consistent statement under MRE 801(d)(1)(B)." *Id*. at 711. See also *People v Mahone*, 294 Mich App 208, 214; 816 NW2d 436 (2011).

On appeal, defendant challenges only the fourth element, arguing that the victim's prior consistent statements were not made before the motive to falsify arose. Defendant asserts that defense counsel's opening statement in conjunction with his questioning of the victim and the detective raised an implied charge of recent fabrication after February 7, 2012, at which time the victim and defendant's strained relationship escalated into a tense phone call. Accordingly, defendant argues that the defense impliedly claimed that the victim fabricated the allegations and

reported the abuse after continued conflict between the victim and defendant because of defendant's lack of involvement in the victim's life. He argues that the victim's statements to her grandmother and the detective occurred after the development of this motive to fabricate.[5] See *Jones*, 240 Mich App at 706-707. Our review of the record confirms that the defense raised such an implied charge of recent fabrication. Additionally, it is clear from the record that the victim made the prior consistent statements to her grandmother and the detective after her birthday in February 2012 and, therefore, made the statements after the development of her alleged motive to falsify. As such, the victim's prior consistent statements to her grandmother and the detective were inadmissible under MRE 801(d)(1)(B). See *Mahone*, 294 Mich App at 214; *Jones*, 240 Mich App at 711.

However, contrary to defendant's characterization of the record, the detective never described at trial a particular statement made by the victim. See *Jones*, 240 Mich App at 706-707. He merely stated that the victim had made statements consistent with her trial testimony. Further, even if the detective's testimony arguably comprised a prior consistent statement, defendant has not established that the admission of the detective's testimony or the grandmother's testimony requires reversal.

An erroneous admission of evidence is presumed to be harmless, and defendant bears the burden of proving otherwise. *People v Lukity*, 460 Mich 484, 491-495; 596 NW2d 607 (1999). We only will reverse a conviction on the basis of erroneously admitted evidence if the defendant "demonstrate[s] that 'after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.' " *Id*. at 495, quoting MCL 769.26. Stated differently, reversal is not required "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id*. at 495-496, quoting MCL 769.26. Examining the entire cause includes evaluating the error "in the context of the untainted evidence." *Id*. at 495. Similarly, with regard to defendant's unpreserved claim of error arising from the admission of the victim's statements to the detective, defendant must establish that the error was prejudicial, meaning that it affected the outcome of the proceeding. See *Carines*, 460 Mich at 763.

With respect to the grandmother's testimony, defendant makes no argument that the preserved evidentiary error resulted in a miscarriage of justice or that it is more likely than not that the admission of the evidence was outcome determinative. See *id*. at 495. Likewise,

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[5] It is unclear from the record whether this was the implied charge of fabrication on which the trial court based is ruling, and whether the trial court determined that the victim's statement to her grandmother occurred before her alleged motive to falsify arose. However, the trial court's vague statements on the record appear to indicate that it found that the admission of the victim's prior consistent statement to her grandmother was proper under MRE 801(d)(1)(B) in light of defense counsel's questions regarding the number of people with whom the victim shared the allegations. It also is apparent that defense counsel's questions regarding the number of times that the victim told the story following the incident were linked to the charge of fabrication arising from the victim's strained relationship with defendant.

defendant provides no basis for concluding that he was prejudiced by the admission of the detective's testimony. *Carines*, 460 Mich at 763. Rather, defendant only asserts that "[t]his case was a credibility contest," and that the admission of these statements improperly bolstered the victim's credibility. As a result, defendant has failed to meet his burden of demonstrating that it is more probable than not that the admission of the victim's prior consistent statement to the grandmother was outcome determinative, see *Lukity*, 460 Mich at 495-496, and that the admission of the victim's prior consistent statement to the detective affected the outcome of the proceeding or otherwise affected his substantial rights, see *Carines*, 460 Mich at 763-764.

Further, our review of the record confirms that the admission of both statements was harmless. The victim's testimony regarding the sexual abuse perpetrated by defendant was sufficient, on its own, to support defendant's conviction. See MCL 750.520h ("The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g."); *People v Hallak*, 310 Mich App 555, 564; ___ NW2d ___ (2015). The grandmother's brief, cumulative testimony merely reiterated a portion of the victim's account of the abuse and provided no independent knowledge of the offense. Notably, as stated *supra*, the detective only stated that the victim's statements to him at the police station were consistent with her testimony at trial; he did not describe the content of the victim's previous statements.

Thus, defendant has not shown error requiring reversal in the admission of either witness's testimony.[6]

## IV. REBUTTAL TESTIMONY

Defendant next argues that the trial court erred in allowing the prosecutor to present the detective's rebuttal testimony because it did not rebut any evidence presented by the defense. We agree, but again conclude that this error was harmless.

### A. STANDARD OF REVIEW AND APPLICABLE LAW

"Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

"Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *Id*. at 399 (quotation marks and citation omitted). "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id*. Accordingly, "[t]he question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *Id*. Thus, "[a]s long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence

[6] Because defendant has not established error requiring reversal, we need not address the merits of the prosecution's alternative arguments concerning this issue.

admitted in the prosecutor's case in chief." *Id*. However, "[t]he prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter." *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

B. ANALYSIS

On direct examination, defendant admitted that he initially lied to the police regarding whether he was in contact with the victim and her half-sister on August 10, 2011. He also explained that he lied about the incident because being around children constituted "a violation of [his] tether." The defense elicited no evidence regarding whether defendant concocted a story with his wife or whether defendant instructed his wife to lie to the police. Subsequently, on cross-examination, the prosecution extensively questioned defendant regarding whether he discussed the incident with his wife, whether he instructed his wife to tell police that the victim was not present at his apartment on the day of the incident, and whether he was aware of the statements that his wife made to the police.

On rebuttal, the detective testified that her contact with defendant's wife was "over a month" after she initially spoke with defendant. The detective further testified that, when she spoke with defendant's wife about the incident, the wife initially indicated that she did not see the victim that day and that the victim was not at defendant's home. However, the detective had defendant's GPS information by the time she spoke with defendant's wife, and she asked his wife whether they picked up the victim from her job. Defendant's wife indicated that they only went to the victim's place of employment to eat and that it was a coincidence that they ran into the victim.

Based on the prosecution's arguments both in the trial court and on appeal, the detective's rebuttal testimony was offered solely in response to answers elicited by the prosecution on cross-examination. Again, "[t]he question whether rebuttal is proper depends on what proofs the defendant introduced and *not on merely what the defendant testified about on cross-examination*." *Figgures*, 451 Mich at 399 (emphasis added). Additionally, "a denial cannot be elicited on cross-examination simply to facilitate the admission of new evidence." *Id*. at 401. Thus, here, the detective's rebuttal evidence was not offered to "contradict, repel, explain or disprove evidence *produced by the other party* and tending directly to weaken or impeach the same." *Id*. at 399 (quotation marks and citation omitted; emphasis added). Defendant expressly acknowledged that the account of the incident indicating that neither the victim nor her half-sister was present at his house on the day of the incident was a lie. Contrary to the prosecution's arguments in the trial court, rebuttal evidence suggesting that defendant's wife also lied to the police in the same manner as defendant only further *confirmed* defendant's admission that his initial story was a lie; it did not contradict, repel, explain, or disprove defendant's admission. Thus, the trial court clearly abused its discretion in admitting the rebuttal testimony. See *id*. at 398.

However, consistent with his other evidentiary claims, defendant fails to provide any argument that "the error asserted has resulted in a miscarriage of justice," or demonstrate that "that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496. Likewise, in examining the detective's rebuttal testimony "in the context of the untainted evidence," there is no indication that the testimony affected the trial's outcome. See *id*.

The rebuttal testimony was extremely brief, spanning less than four pages of the lengthy transcript. Additionally, this testimony was entirely consistent with the story that defendant initially provided to the police, which he expressly admitted was a lie in order to protect himself from a violation of his tether. Because this rebuttal testimony, which concerned admittedly false statements, provided absolutely no insight regarding defendant's interactions with the victim on the day of the incident, it demonstrated, at most, that both defendant and his wife initially lied to the police, and there is no indication that this rebuttal testimony was outcome determinative.

Therefore, although the trial court abused its discretion in admitting the detective's rebuttal testimony, the error was harmless and does not require reversal of defendant's conviction.

## V. JUDICIAL FACT-FINDING

Defendant argues that he is entitled to resentencing because the trial court imposed a sentence using facts that were not proven by the jury beyond a reasonable doubt. We agree that the trial court committed error and conclude that it is necessary to remand this matter.

### A. STANDARD OF REVIEW

Because defendant preserved this issue by raising it in a motion to remand filed with this Court, which cross-referenced this argument in his application for leave to appeal, see *People v Terrell*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321573); slip op at 8; *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013), we review this error under the harmless error standard, see *People v Stokes*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321303); slip op at 10 ("A *Lockridge* error is not structural, and thus, must be reviewed for harmless error.").[7]

### B. ANALYSIS

A Sixth Amendment violation (i.e., "a *Lockridge* error") occurs when "facts admitted by a defendant or found by the jury verdict were insufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *People v Lockridge*, 498 Mich 358, 395; 870 NW2d 502 (2015). "[A] constitutional error occurs regardless of whether the error has a substantive effect on the defendant's sentence." *Id*. at 394 n 30.

Here, the facts necessary to assess 10 points for OV 4, MCL 777.34 (psychological injury to victim), 15 points for OV 8, MCL 777.38 (victim asportation or captivity), and 10 points for

[7] Contrary to the prosecution's claim on appeal, defendant did not waive this issue. See *People v Terrell*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321573); slip op at 8 n 40 ("[W]e conclude that [the defendant's] agreement to the scoring was not an admission for *Lockridge* purposes. Rather, it could reasonably be interpreted as only an admission that the OVs were supported by a preponderance of the evidence.").

OV 10, MCL 777.40 (exploitation of vulnerable victim), were not established by the jury's verdict—which convicted defendant of CSC III under either MCL 750.520d(1)(b) or MCL 750.520d(1)(d)—and were not admitted by defendant. Compare MCL 777.34(1)(a), MCL 777.38(1)(a), and MCL 777.40(1)(c), with MCL 750.520d, and *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000) ("The offense of CSC III requires a showing that the defendant engaged in sexual penetration with another under certain aggravating circumstances . . . ."). "[T]hose facts were used to increase the defendant's mandatory minimum sentence, [thereby] violating the Sixth Amendment," as the points assessed for those variables significantly altered the minimum range calculated under the sentencing guidelines. *Lockridge*, 498 Mich at 393.

"[A]ll defendants," like defendant here, "(1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Id*. at 395; see also *Stokes*, ___ Mich App at ___; slip op at 6-7 (arriving at the same conclusion with regard to a preserved *Lockridge* claim). This further inquiry is through a "*Crosby*[8] remand," during which the trial court must determine whether it "would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Stokes*, ___ Mich App at ___; slip op at 9 (quotation marks and citation omitted); see also *Lockridge*, 498 Mich at 395-399.

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by [MCR 6.425], if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Stokes*, ___ Mich App at ___; slip op at 9, quoting *Lockridge*, 498 Mich at 398 (alterations in original; block quote omitted).]

Thus, we remand for implementation of the *Crosby* procedure so that the trial court may determine whether resentencing is appropriate in this case.

## VI. RIGHT TO A SPEEDY TRIAL

Finally, defendant argues, in a supplemental brief filed *in propria persona* pursuant to Administrative Order 2004–6, Standard 4, that he was denied his constitutional right to a speedy trial and that his delayed trial violated the statutory 180-day rule under MCL 730.131.

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[8] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

Defendant's analysis of this issue conflates these two concepts, which are distinct and governed by different principles. Most notably, unlike the 180-day rule, the constitutional right to a speedy trial is not predicated on a fixed number of days. *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013). Nevertheless, in separately considering the applicability of both principles in this case, we conclude that defendant's claims lack merit.

## A. STANDARD OF REVIEW

We review *de novo* a trial court's interpretation and application of the 180-day rule. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). However, defendant failed to preserve his claim that his constitutional right to a speedy trial was violated, as he failed to make a "formal demand on the record" with respect to this claim.[9] *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Thus, we review this argument for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 762-765.

## B. ANALYSIS

### 1. VIOLATION OF THE 180-DAY RULE

The *statutory* right to a speedy trial is set forth in MCL 780.131(1), which provides, in relevant part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The 180-day "rule governs personal jurisdiction and thus is waivable." *People v Lown*, 488 Mich 242, 269; 794 NW2d 9 (2011) (emphasis omitted). "[W]aiver is the intentional relinquishment or abandonment of a known right." *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) (quotation marks and citation omitted). "A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of

[9] In the trial court, defendant moved to dismiss this case only under the 180-day rule. Although he briefly referring to it as "the speedy trial rule," and briefly noted in passing that "he was entitled to a speedy trial," he made no argument in the trial court with respect to his constitutional right to a speedy trial. Likewise, consistent with defendant's framing of his claim, the trial court's analysis of defendant's motion to dismiss was expressly limited to the application of the 180-day rule.

that right." *Id*. "[A] defendant may forfeit the rule requiring commencement of action within 180 days by requesting or consenting to delays . . . ." *Lown*, 488 Mich at 270.

In his Standard 4 brief, defendant fails to acknowledge that the parties entered into a written stipulation on August 21, 2013, signed by the prosecutor and defense counsel, which stated that the parties agreed to adjourn the trial because defendant wished to reinstate his right to a jury trial. The agreement and stipulation expressly acknowledged that defendant, in seeking to adjourn the trial scheduled on August 22, 2013, waived his statutory right to a trial within 180 days under MCL 780.131.[10] Thus, it is clear that defendant's act of entering into this stipulation intentionally abandoned his known right. See *Vaughn*, 491 Mich at 663.

Therefore, defendant waived this statutory issue, and any underlying error has been extinguished. See *id*.

2. CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

Both "the federal and state constitutions and Michigan statutory law guarantee criminal defendants a speedy trial without reference to a fixed number of days." *McLaughlin*, 258 Mich App at 644, citing US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. See also MCR 6.004(A). "In determining whether a defendant has been denied the right to a speedy trial, we balance the following four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). "Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury." *Id*. at 262. However, the delay considered in determining whether a presumption of prejudice applies is delay not attributable to the defendant. See *People v Holtzer*, 255 Mich App 478, 492; 660 NW2d 405 (2003) (explaining that the defendant was "correct that if the delay *not attributable to defendant exceeds eighteen months*, prejudice is presumed") (emphasis added).

Under the first prong, the full length of the delay is somewhat unclear from the record. In general, "[t]he time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006), citing *United States v Marion*, 404 US 307, 312; 92 S Ct 455; 30 LEd2d 468 (1971). However, defendant was initially arrested in March 2012 for a parole violation, not for the instant offense. Nevertheless, as the parties agree, the charges at issue in this case were originally filed on July 27, 2012,[11] and we conclude that this is the relevant start date for determining the length of the delay. See *Marion*, 404 US at 320 ("[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial

[10] Notably, the August 22, 2013 trial date was within 180 days after the Department of Corrections sent the requisite statutory notice on April 17, 2013.

[11] According to the prosecution's explanation at trial, the charges were both dismissed and reissued on March 25, 2013.

provision of the Sixth Amendment."); *United States v Garner*, 32 F3d 1305, 1309-1310 (CA 8, 1994); *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987) ("A formal charge against, or restraint of, the accused is necessary to call the right to speedy trial into play."). Defendant's trial began on February 12, 2014. Accordingly, the total length of the delay was approximately 18 and one-half months.

"In assessing the reasons for the delay [under the second prong], this Court must examine whether each period of delay is attributable to the defendant or the prosecution." *People v Waclawski*, 286 Mich App 634, 666; 780 NW2d 321 (2009). Based on the prosecutor's explanation on the record, the case was initially delayed due to "procedural issues" in the district court, which are unexplained in the record. Thus, we attribute these initial delays to the prosecution. See *id*. Once in the circuit court, in May 2013, defendant waived his right to a jury trial and elected to move forward with a bench trial. A bench trial was scheduled for July 18, 2013. On July 17, 2013, the prosecution requested an adjournment of the trial, which defendant opposed, because some of the witnesses had not been successfully served and the prosecutor overseeing the case had been ill. The trial court granted the adjournment and rescheduled the trial for August 22, 2013.[12] Accordingly, we attribute the initial delay of approximately 13 months to the prosecution. See *id*.

Thereafter, the parties entered into a stipulation to adjourn the trial scheduled to begin on August 22, 2013. As explained *supra*, the stipulation stated that the parties agreed to adjourn the trial because defendant reasserted his right to a jury trial after his initial request for a bench trial. Thus, but for defendant's own actions in requesting a jury trial, he was originally set to have a bench trial on August 22, 2013. The trial was rescheduled for December 3, 2013. However, on November 27, 2013, defendant stipulated to another adjournment of the trial date in light of a pending plea deal that he had presented to the prosecution. Notably, defendant personally affirmed on the record that he wished to adjourn the trial. According to the register of actions, on December 2, 2013, the trial was scheduled for February 12, 2014. As such, it is apparent that defendant was responsible for the latter four to five months of the delay.

Under the third prong, as previously noted, the record includes no indication that defendant asserted his constitutional right to a speedy trial in the trial court; he merely argued the 180-day rule. Although it appears from the parties' and the trial court's statements on the first day of trial that defendant may have asserted his right to a speedy trial in the district court, the lower court record received on appeal includes nothing relating to this assertion. Additionally, the trial court stated that the claim raised in the district court was effectively the same as that raised in the circuit court, which was premised solely on the 180-day rule. Further, defendant *only* asserts in his Standard 4 brief that this prong was fulfilled by the Department of

[12] It is noteworthy that at a hearing on July 17, 2013, the circuit court suggested that the defense may be inclined to file a motion concerning defendant's speedy trial rights after the prosecution's request for an adjournment was granted, given the period of time that had passed. However, as discussed *supra*, defendant never asserted his *constitutional* right to a speedy trial in the circuit court.

Correction's actions after it became aware of defendant's charges in this case, which, contrary to defendant's claims, is not equivalent to an assertion of the right to a speedy trial *by defendant*. See *Williams*, 475 Mich at 261-262. He does not claim that he otherwise asserted this right. Thus, especially given the fact that this case was in the circuit court for nearly eight months before defendant raised any issue even related to his right to a speedy trial—only raising a claim based on the 180-day rule *on the first day of trial*—we conclude that this factor weighs against defendant. Cf. *Holtzer*, 255 Mich App at 495 (noting that a defendant's speedy-trial claim may come "so late as to be devoid of any sincerity or conviction") (quotation marks and citation omitted); *Waclawski*, 286 Mich App at 668 (stating that when a defendant asserts his right to a speedy trial shortly before the actual commencement of the trial, "this factor weighs only the slightest in defendant's favor.").

Finally, under the fourth prong, prejudice is not presumed because the length of the delay not attributable to defendant was less than 18 months. See *Holtzer*, 255 Mich App at 492-493. Thus, defendant must prove that he suffered prejudice. *Cain*, 238 Mich App at 112. " 'There are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to the defense.' " *Williams*, 475 Mich at 264, quoting *People v Collins*, 388 Mich 680, 694; 202 NW2d 769 (1972). "Prejudice to his person would take the form of oppressive pretrial incarceration leading to anxiety and concern. Prejudice to his defense might include key witnesses being unavailable." *Collins*, 388 Mich at 694. "Prejudice to the defense is the more serious concern, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Williams*, 475 Mich at 264 (quotation marks and citation omitted). This prong of the "test may properly weigh against a defendant incarcerated for [a period longer than 19 months] if his defense is not prejudiced by the delay." *Williams*, 475 Mich at 264.

Here, defendant only asserts prejudice on the basis that "his liberty interest" was denied due to the delay. He identifies no other source of prejudice, and we discern no other prejudice from the record. Most significantly, there is no indication in the record that defendant's defense was prejudiced by the delay. The record does not show—nor does defendant argue—that the delay made a key witness unavailable, caused a loss of evidence, or otherwise inhibited his defense.

In balancing the relevant factors, we find very significant the fact that the length of the delay not attributable to defendant was significantly less than 18 months, as well as the facts that defendant's own actions instigated the last two adjournments of defendant's trial, that there is no indication that defendant's defense was prejudiced by the pretrial delay, and that defendant never asserted a claim even akin to his constitutional right to a speedy trial for many months in the trial court. Additionally, under the plain error standard of review, defendant has the burden of establishing that this error affected the outcome of the lower court proceedings. See *Carines*, 460 Mich at 763. Defendant has neither argued nor established that the delay affected the outcome of his trial.

Accordingly, we conclude that defendant has failed to establish a violation of his right to a speedy trial that constituted a plain error affecting his substantial rights. See *id*.

## VII. CONCLUSION

Defendant has failed to establish that reversal of his conviction is warranted. However, remand is required so that the trial court may implement the *Crosby* remand procedure and determine whether resentencing is necessary.

We affirm defendant's conviction, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan