# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 3, 2012 |
| v | No. 303042<br>Cass Circuit Court |
| JUSTIN BRUCE HIVELY,<br><br>Defendant-Appellant. | LC No. 10-010084-FH |

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Justin Bruce Hively appeals as of right his jury-trial convictions of third-degree criminal sexual conduct (CSC-III) (person at least 13 and under 16 years of age), MCL 750.520d(1)(a), and fourth-degree criminal sexual conduct (CSC-IV) (person at least 13 and under 16 years of age), MCL 750.520e(1)(a). The jury was unable to come to an agreement on the charge of contributing to the delinquency of a minor, MCL 750.145. The trial court sentenced defendant to 6 to 15 years' imprisonment for the CSC-III conviction and 87 days in jail for the CSC-IV conviction. We affirm.

## I. PERTINENT FACTS

This case arises from sexual conduct occurring between defendant and the victim ("CM") after defendant and CM began an internet relationship when defendant was 24 years old and CM was 14 years old. CM met defendant on the website "myYearbook" and began an internet relationship with him. Although defendant was 24 years old, he told CM that he was 16 years old. CM told defendant that she was 14 years old. Defendant and CM began to speak on the telephone and ultimately made plans to meet in person. Defendant encouraged CM to lie to her parents about her whereabouts during the meeting, so CM told her parents that she was going to spend the weekend at a friend's home. On January 8, 2010, defendant picked up CM from her home and took her to a trailer where he lived with his mother. CM and defendant had sexual intercourse later that evening and again the next day. When CM's parents learned that CM was not with her friend, they began a frantic search for her. Defendant's mother discovered that the police were looking for CM and told defendant. As a result, defendant drove CM back to her home where CM's parents were waiting with Officer Brandon Dahl. CM's parents collected CM's underwear and gave it to the police; DNA testing performed at the Michigan State Police Crime Lab established that the underwear contained a small spot of seminal fluid that was

consistent with defendant's DNA. During an initial police interview, CM denied having sexual contact with defendant. However, several weeks later, CM admitted to having sexual intercourse with defendant. When questioned by Officer Dahl, defendant denied having sexual contact with CM.

At trial, CM testified that she and defendant engaged in the sexual conduct summarized above. Moreover, LD, a 14-year-old girl, testified for the prosecution pursuant to MCL 768.27a that she met defendant on "myYearbook" and that defendant told her that he was 16 years old. LD further testified that she and defendant began communicating over the telephone and ultimately had sexual intercourse on numerous occasions before defendant's arrest in November 2010. Defendant also testified at trial, emphasizing that he thought both CM and LD were 18 years old and that he did not have sexual contact with either CM or LD.

## II. MCL 768.27a

On appeal, defendant first contends that MCL 768.27a is unconstitutional, arguing that (1) MCL 768.27a and MRE 404(b) conflict irreconcilably and (2) MCL 768.27a cannot prevail over MRE 404(b) because the statute unconstitutionally infringes on both the Supreme Court's authority under Const. 1963, art. 6, § 5, to regulate practice and procedure in all courts of this state and the exclusive power vested in the courts under Const. 1963, art. 6, § 1, to ensure that a criminal defendant receives a fair trial. While we agree that MCL 768.27a and MRE 404(b) irreconcilably conflict, we do not agree that MCL 768.27a is unconstitutional.

We review a challenge to the constitutionality of a statute de novo. *People v Abraham*, 256 Mich App 265, 280; 662 NW2d 836 (2003). Unpreserved constitutional issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCL 768.27a provides in relevant part:

> (1) 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.

In contrast, MRE 404(b)(1) provides in relevant part:

> 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 . . . .

In *People v Watkins*, ___Mich___; ___NW2d___ (Docket No. 142031, issued June 8, 2012), slip op at 2, our Supreme Court recently addressed and rejected the arguments that defendant makes in the present case regarding the constitutionality of MCL 768.27a. While the *Watkins* Court held that "MCL 768.27a irreconcilably conflicts with MRE 404(b)," the Court further held that MCL 768.27a prevails over 404(b) "because it does not impermissibly infringe

on [the Supreme] Court's authority regarding rules of practice and procedure under Const 1963, art 6, § 5." *Watkins*, slip op at 2. Moreover, the Court concluded that "evidence admissible under MCL 768.27a remains subject to MRE 403 . . . ." *Id.* And, "[g]iven this conclusion, [the Court determined that it] need not address whether, if evidence admissible under MCL 768.27a were *not* subject to MRE 403, the statute would violate a defendant's due-process right to a fair trial or interfere with the judicial power to ensure that a criminal defendant receives a fair trial." *Id.* at 2 n 2. Therefore, defendant's argument that MCL 768.27a is unconstitutional lacks merit. See *id.*

Defendant also contends that the trial court erred in applying MRE 403 to LD's testimony. "We review a trial court's evidentiary rulings for an abuse of discretion." *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001); see also *People v Layher*, 464 Mich 756, 770; 631 NW2d 281 (2001) ("We hold that the trial court did not abuse its discretion in determining that the probative value of [the evidence] was not substantially outweighed by the danger of unfair prejudice.").

MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins*, slip op at 34. "[O]ther-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference." *Id.* However, "[t]here are several considerations that may lead a court to exclude such evidence":

> (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.[1] [*Id.* at 35.]

In this case, the probative value of LD's testimony was not substantially outweighed by the danger of unfair prejudice. The evidence was relevant and more than only marginally probative, as it lent credibility to CM's claims and tended to prove that defendant had a propensity to commit sex offenses against minors after meeting them on the internet. See *Watkins*, slip op at 34. The evidence also tended to prove that defendant's actions with respect to CM were not done out of a desire for friendship as he claimed but, instead, were part of a plan to have sexual intercourse with her. Furthermore, the evidence served to rebut defendant's claim that CM was pressured by her parents into making false accusations against him.

[1] The *Watkins* Court emphasized that this list is illustrative rather than exhaustive. *Watkins*, slip op at 35.

Further, nothing among the *Watkins* considerations merits exclusion of the evidence in this circumstance. First, the evidence of defendant's conduct with CM and LD was substantially similar: both CM and LD met defendant on "myYearbook" after defendant sent them unsolicited messages, both CM and LD were 14 years old when they met defendant, defendant lied about his age to both CM and LD, the internet relationships progressed to telephone communications, and defendant arranged to meet both CM and LD for sexual encounters so that the girls' parents would not find out. See *id.* at 35. Second, the close temporal proximity between defendant's sexual encounters with CM and LD evidences that LD's testimony was highly probative and not simply evidence of remote sexual acts offered to prejudice defendant. See *id.* Third, evidence of defendant's involvement in criminal sexual conduct with only one other minor does not make it infrequent. LD testified that she had sexual encounters with defendant three or four times every other week until defendant's arrest in November 2010. Fourth, there are no appreciable intervening acts. Fifth, nothing indicates that LD's testimony was unreliable. See *id.* Finally, there was not a lack of a need for evidence beyond CM's and defendant's testimony. See *id.* Defendant denied having sexual contact with CM and offered an explanation for the presence of his DNA on CM's underwear. While CM ultimately admitted to engaging in sexual conduct with defendant and testified at trial about the sexual conduct, she initially denied the sexual conduct and offered the same explanation as defendant for the presence of his DNA on her underwear. Accordingly, we find that the trial court did not abuse its discretion in admitting the other-acts evidence under MRE 403. See *Layher*, 464 Mich at 770.

## III. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct that denied him a fair trial. Our review is limited to plain error affecting defendant's substantial rights because defendant failed to contemporaneously object to the alleged misconduct and request a curative instruction. See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Where a curative instruction could have alleviated any prejudicial effect, we will not find error warranting reversal. *Id.* "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, . . . and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant contends that the prosecutor improperly referenced sentencing issues during his closing argument. Specifically, the prosecutor encouraged the jury not to consider whether defendant mistakenly thought that CM was 18 years old because the trial court could consider that at sentencing. We agree that this was improper. See *People v Goad*, 421 Mich 20, 25-26; 364 NW2d 584 (1984) (sentencing issues should not be referenced at trial). However, the trial court instructed the jury that it had to decide the case based only on the evidence presented at trial, that the attorneys' statements were not evidence, that mistake was not a defense to the charged offenses, and that it was not to consider possible penalties. These instructions were sufficient to cure any prejudice. See *Callon*, 256 Mich App at 329; *Unger*, 278 Mich App at 235. Defendant has not demonstrated plain error requiring reversal. See *Callon*, 256 Mich App at 329.

Next, defendant contends that the prosecutor improperly denigrated his credibility based on personal opinion when he characterized defendant's testimony as a "cockamamie" story. We disagree. A prosecutor "must refrain from denigrating a defendant with intemperate and

prejudicial remarks," and such comments are reviewed in context. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, "a prosecutor need not state arguments in the blandest possible terms." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). After reviewing the record, we conclude that the prosecutor did not improperly inject his personal opinion regarding defendant's credibility. Rather, the prosecutor properly commented that defendant's testimony was not worthy of belief based on reasonable inferences arising from the record evidence. See *Howard*, 226 Mich App at 548. Further, the prosecutor's use of the word "cockamamie" was not improper where a prosecutor is not required to cloak his argument in the blandest possible terms. See *Matuszak*, 263 Mich App at 55-56 (no misconduct where the prosecutor characterized the defendant's argument as "ridiculous").

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant raises several claims of ineffective assistance of counsel. Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to timely raise this issue in a motion for a new trial or *Ginther*[2] hearing, our review is limited to errors apparent from the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009); *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998); MCR 7.211(C)(1); MCR 7.212(A).

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. It is presumed that counsel rendered adequate assistance. *Id.* at 690. "[A] reviewing court must conclude that the defendant's trial counsel's act or omission fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *People v Gioglio (On Remand)*, ___Mich App___; ___NW2d___ (Docket No. 293629, issued March 20, 2012), slip op at 5, quoting *Cullen v Pinholster*, 563 US ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011). Second, defendant must show that his counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To do so, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Defendant contends that counsel rendered ineffective assistance when she failed to object to the alleged instances of prosecutorial misconduct. As discussed above, the prosecutor's use of the word "cockamamie" was not improper; thus, counsel was not deficient for failing to make a futile objection. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Moreover, defendant has not demonstrated a reasonable probability that, but for counsel's failure to object to the prosecutor's improper reference to sentencing considerations during closing argument, the result of his trial would have been different. See *Strickland*, 466 US at 694. As previously discussed, the trial court provided a curative instruction to the jury. And there was substantial evidence demonstrating that defendant committed third- and fourth-degree criminal sexual conduct: CM's testimony regarding the sexual conduct, the presence of seminal fluid on CM's underwear that was consistent with defendant's DNA, and LD's testimony illustrating defendant's propensity to engage in sexual conduct with minors and the similarity of his conduct when initiating such relationships.

Next, defendant contends in his Standard 4 brief that counsel was ineffective when she failed to move for a continuance after the trial court allowed the prosecution to amend its witness list and add a chain-of-evidence witness one day before the trial was scheduled to commence. Defendant also contends that counsel failed to interview the witness before trial. First, defendant cannot show that counsel's failure to move for a continuance resulted in any prejudice because the trial was delayed for nearly two months after the prosecution added the witness. See *id*. Second, even assuming that counsel did not interview the witness before trial, defendant fails to indicate how, but for counsel's failure to conduct an interview, the result of the proceeding would have been different. See *id*. Defendant does not articulate what counsel could have asked the witness during a pretrial interview that would have better prepared her for cross-examination, how counsel could have cross-examined the witness more effectively, or how such cross-examination would have had any impact on the jury. In sum, defendant's argument lacks merit.

Next, defendant contends that counsel was ineffective when she failed to call an expert witness to rebut the testimony of prosecution expert Dr. James Henry, who testified concerning characteristics of sexually abused children. Defendant also contends that counsel acted deficiently when she failed to call an expert to testify regarding the authenticity of a prosecution email exhibit. Whether to call witnesses are matters of trial strategy which we will not second-guess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to show that trial counsel's failure to call an expert witness amounted to ineffective assistance, a defendant must offer proof that an expert would have testified favorably if called by the defense. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); see also *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel . . . ."). Defendant fails to offer any proof that experts would have offered favorable testimony for the defense; as such, he has failed to establish the factual predicate for his claim. See *Hoag*, 460 Mich at 6; *Ackerman*, 257 Mich App at 455. Moreover, defendant cannot show prejudice given the substantial evidence of his guilt. See *Strickland*, 466 US at 694. Therefore, defendant's ineffective-assistance-of-counsel claim on this basis fails.

## V. JURY SELECTION

Next, defendant contends that he was denied his constitutional rights when "jury contamination" occurred. Defendant fails to provide any meaningful analysis of this issue;

defendant merely cites to statements made by prospective jurors and concludes that the statements demonstrate that he was denied a fair trial. Furthermore, defendant provides scant citation to legal authority to support his position.[3] Thus, defendant's cursory analysis amounts to abandonment of this issue. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("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 with little or no citation of supporting authority."). Nevertheless, we have reviewed this issue and conclude that defendant's argument lacks merit. A juror's assurance to the trial court to remain impartial is enough to ensure a defendant's right to an impartial jury. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001); see also *Irvin v Dowd*, 366 US 717, 723; 81 S Ct 1639; 6 L Ed 2d 751 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."). Jurors are presumptively impartial, and once a juror assures the trial court of an ability to remain impartial, the defendant must demonstrate that the juror is partial or biased. *Johnson*, 245 Mich App at 256. Here, each of the prospective jurors who served on the jury that defendant takes issue with assured the trial court that he or she could serve impartially; defendant has not demonstrated that these jurors were actually biased. See *id.*

## VI. CUMULATIVE ERROR

Finally, defendant contends that the cumulative effect of errors in this case warrants reversal. We disagree. Even if the effect of one error does not warrant reversal, the cumulative effect of several errors can. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). However, "[a]bsent the establishment of *errors*, there can be no cumulative effect of *errors* meriting reversal." *Id.* (emphasis added). Here, there was only one error (the prosecutor's interjection of sentencing considerations during closing argument), so there is no "cumulative effect of *errors* meriting reversal." See *id.* (emphasis added).

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause

[3] We note that defendant only cites to *Mach v Stewart*, 137 F3d 630 (CA 9, 1997) in support of his argument, and his reliance on *Mach* is misplaced. *Mach* involved "highly prejudicial" "expert-like" statements regarding the veracity of children in child sexual-abuse cases from a potential juror who had taken child-psychology courses and worked as a social worker. *Mach*, 137 F3d at 632-634. None of the prospective jurors in this case presented themselves during voir dire as experts in child sexual abuse or made statements that were "highly prejudicial." See *id.*