STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2012
v	No. 304248 Kalamazoo Circuit Court
LONNIE HANEY, Defendant-Appellant.	LC No. 2010-002000-FC

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

PER CURIAM.

After a jury trial, defendant Lonnie Haney was convicted of three counts of first-degree criminal sexual conduct (CSC I), committed by an individual 17 years of age or older against an individual less than 13 years of age. MCL 750.520b(2)(b). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent sentences of 25 to 40 years' imprisonment for each CSC I conviction. Defendant appeals as of right. We affirm in part and remand for further proceedings consistent with this opinion.

This case arises out of a November 2, 2010, incident where defendant picked up the 12-year-old victim and her brother as they were walking to school and drove them to McDonald's for breakfast. After getting breakfast, defendant took the victim's brother to school but took the victim to an apartment where he sexually assaulted her.

Defendant first argues that the trial court abused its discretion by permitting the prosecutor, over defense counsel's objection, to frequently use leading questions during the direct examination of the victim. We disagree.

We review a trial court's decision to allow leading questions for an abuse of discretion. See *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973). A trial court abuses its discretion when it reaches a decision that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To warrant reversal on the basis of improper questions, "'it is necessary to show some prejudice or pattern of eliciting inadmissible testimony.'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), citing *People v White*, 53 Mich App 51, 58; 218 NW2d 403 (1974).

MRE 611(d)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony."

However, MCL 768.24 provides that "[w]ithin the discretion of the court no question asked of a witness shall be deemed objectionable solely because it is leading." Moreover, "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses," *Watson*, 245 Mich App at 587, especially when that testimony is of a sexual nature. See *People v Kratz*, 230 Mich 334, 340; 203 NW 114 (1925); *People v Hicks*, 2 Mich App 461, 465-466; 140 NW2d 572 (1966); *People v Kosters*, 175 Mich App 748, 756; 438 NW2d 651 (1989).

In this case, the victim was 13 years old when she testified, and she was testifying regarding events of a sexual nature. Review of the record reveals that the trial court properly granted the prosecutor limited leeway in asking leading questions of the victim in accord with *Watson*, 245 Mich App at 587, and to sometimes repeat or rephrase her question when no answer was forthcoming.[1] The questions were not overly suggestive and were crafted in such a way as to fairly elicit answers. Any leading of the witness was only to the extent necessary to develop her testimony. See MRE 611(d)(1). As such, the trial court did not abuse its discretion. See *Fields*, 49 Mich App at 658.

Defendant next argues that he was unfairly prejudiced by Detective Kristin Cole's testimony because it implied that defendant had a criminal history. Defendant did not object at trial to Detective Cole's testimony or seek a limiting instruction; thus, the issue is unpreserved. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An unpreserved claim of evidentiary error is reviewed for plain error. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). To avoid forfeiture under the plain-error rule, clear or obvious error must have occurred and affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In order to avoid the danger of unfair prejudice, "the general rule is that evidence tending to show the commission of other criminal offenses by the defendant is inadmissible on the issue of his guilt or innocence of the offense charged." *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). Such evidence may only be introduced under MRE 404(b) or under the res

[1] Defendant also alleges in his statement of questions presented that the trial court erred in allowing the prosecutor to ask repetitive questions of the victim when she did not receive the desired answer. But defendant failed to argue this issue in his brief. An appellant may not merely "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Even if defendant had properly briefed the issue, however, we find it to be without merit. Review of the record reveals that the prosecutor repeated or rephrased her question in instances where the victim fell silent and failed to answer, was hard to hear as the trial court noted, or as necessary to develop the child witness's testimony. The trial court did not abuse its discretion in permitting the prosecutor to repeat her questions under the circumstances presented.

gestae exception. *People v Key*, 121 Mich App 168, 179-180; 328 NW2d 609 (1982); *People v Smith*, 119 Mich App. 431, 436; 326 NW2d 533 (1982). But evidence is not subject to an MRE 404(b) analysis merely because it discloses a bad act; it may be relevant for some other purpose and admissible under MRE 401 without regard to MRE 404(b) as long as it is not unduly prejudicial under MRE 403.

Here, defendant was charged with three counts of first-degree criminal sexual conduct, committed by an individual 17 years of age or older against an individual less than 13 years of age. MCL 750.520b(2)(b). An element that the prosecution had to prove was that defendant was 17 years of age or older at the time of the incident. The prosecutor asked Detective Cole if she knew how old defendant was and—arguably for foundational purposes—how Detective Cole knew defendant's age. Detective Cole stated that "during the course of my part of the investigation, I have to run a criminal history." She also added that she has to send paperwork through the Secretary of State and the Law Enforcement Information Network. Because Detective Cole's testimony established defendant's age, it had a tendency to make the existence of a fact of consequence to the determination of the action more probable than it would have been without the evidence and, thus, was relevant for purposes of proving the elements of MCL 750.520b(2)(b). See MRE 401.

MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Detective Cole's implication that defendant had a criminal history may have been prejudicial if it caused the jury to focus on defendant's bad character. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). However, Detective Cole's statement indicated a requirement to run a criminal history and not that defendant had a criminal history. The jury was not given any specific information concerning defendant's criminal history. Moreover, Detective Cole's testimony that she also checked through the Secretary of State limited the importance the jury could place on the criminal-history check. Under these circumstances, any prejudice from Detective Cole's testimony was minimal.

Even assuming that Detective Cole's testimony regarding the criminal-history check was unduly prejudicial under MRE 403, defendant fails to show that the testimony affected the outcome of the lower court proceedings. See *Carines*, 460 Mich at 763. The victim testified to acts of sexual penetration forming the basis of the conviction. When a physician and a sexual-assault nurse examiner examined the victim, they both found injuries to the victim consistent with her account of the sexual assault. Defendant admitted at trial that the victim was with him on the day of the incident and that he took her to the apartment where the victim said the abuse happened. Moreover, defendant confessed to Detective Cole that he touched the victim's anus and vagina with his fingers, pressed his penis against the victim's anus, and may have penetrated the victim with his fingers. The evidence against defendant was overwhelming and clearly supported the finding of guilt beyond a reasonable doubt.

Finally, defendant argues that he received ineffective assistance of counsel associated with a plea offer. Defendant contends that, although there is no record of it because it occurred in chambers, the prosecutor offered him a plea deal of "8-years [sic] in prison" on the second day of trial. Defendant contends that his counsel advised him not to accept the offer because "i) the case against me was weak, and ii) we were already in the middle of trial" and that his counsel

failed to advise him of the 25-year mandatory minimum for a CSC I conviction. Defendant contends that "[h]ad I known that I was facing 25-years [sic], I would have accepted the plea." Defendant requests that this Court remand for a *Ginther*[2] hearing to develop a factual record for his claim.

> To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. *Strickland v Washington*, 466 US 668, 687–688; 104 SCt 2052; 80 LEd 2d 674 (1984); *People v Carbin*, 463 Mich 590, 599–600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). These same standards apply where a defendant's ineffective assistance of counsel claim is based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a prosecutor's plea offer. *Hill v Lockhart*, 474 US 52, 58; 106 SCt 366; 88 LEd 2d 203 (1985). [*People v. McCauley*, 287 Mich App 158, 162; 782 NW 2d 520 (2010), lv held in abeyance ___Mich___; 792 NW2d 331 (2011).]

"In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v Cooper*, ___US___; ___S Ct___; ___LEd 2d___ (2012), slip op at 4. In an instance where a defendant rejects a plea offer based on the ineffective advice of counsel,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.
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> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.
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> [A]n erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. [*Id.* at 5, 9, 15.]

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

Review of the record reveals that the parties engaged in plea negotiations in chambers on the *first* day of trial:

> THE COURT: We've taken a break. I asked for the lawyers to meet in chambers. . . . There was some discussion of an offer of a plead guilty [sic] to one count of the less serious charge of criminal sexual conduct second degree. The defendant would plead guilty as a [third] offender to the second degree and then there would be a sentence at the mid-point of the guidelines which would result in a sentence-Killibrew agreement and a Cobbs agreement of a sentence of 86 months to 30 years.
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> It's my understanding, [defense counsel], that that was communicated to Mr. Haney. He did not wish to avail himself of that and that now the offer's been withdrawn and we're going to continue with the trial. Is that correct?
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> DEFENSE COUNSEL: That is correct, your Honor. I advised Mr. Haney that we were talking about an agreement which involved prison time, a minimum of 86 months, and he processed that and a definite no.
>
> THE COURT: All right. And so the offer's withdrawn. We're going to continue on with trial.

The record is silent with respect to what advice, if any, defense counsel provided defendant regarding this plea offer.[3] Furthermore, the record is insufficient for this Court to conduct a prejudice analysis under *Lafler*. Given the insufficiency of the record in this regard, the record evidence regarding the plea offer, and the prosecution's position on appeal that remand for a *Ginther* hearing is appropriate, we remand to the trial court so that it may conduct a *Ginther* hearing to develop a factual record and to determine whether defense counsel provided ineffective assistance with respect to defendant's plea negotiations under the framework articulated by the Supreme Court in *Lafler*. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

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

[3] We note, however, that the record defies defendant's contention that he was unaware of the 25-year mandatory minimum for the CSC I charges. On the first day of trial and before the plea offer made in chambers, the trial court inquired about the status of the parties' plea-bargain negotiations, and a discussion occurred on the record—in defendant's presence—regarding the 25-year mandatory minimum.