STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v	No. 324706 Oakland Circuit Court
GLEN ALLEN NORTON, Defendant-Appellant.	LC No. 14-249040-FC

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b), and three counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). Defendant was sentenced to 25 years to 80 years' imprisonment for each CSC-I conviction and 71 months to 15 years' imprisonment for each CSC-II conviction, with the sentences for the CSC-II convictions to run consecutively to the sentences for the CSC-I convictions. We affirm defendant's convictions but remand for a determination on resentencing of defendant's CSC-II sentences.

I. EVIDENTIARY ISSUES

A.

Defendant contends that the trial court erred in permitting Detective Xavier Piper to testify regarding his observations of defendant's physical response to the charges at the arraignment. Primarily, defendant asserts that the testimony was more prejudicial than probative. Alternatively, defendant argues his trial counsel was ineffective for failing to object to this testimony.

To preserve a claim of evidentiary error, "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's counsel did not object to Detective Piper's testimony regarding his observations at defendant's arraignment. As such, the issue is not preserved for appellate review. Unpreserved evidentiary claims are reviewed for plain error affecting substantial rights. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). A plain error is found to affect substantial rights when "the error affected the outcome of the lower-court proceedings." *People v Jones*, 468 Mich 345, 356;

662 NW2d 376 (2003). Reversal is not required unless "the plain, unpreserved error resulted in the conviction of an actually innocent defendant or . . . seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id*. at 355.

At trial, Detective Piper testified to observing defendant at his arraignment hearing. He described defendant's physical response to the reading of the charges as an obvious erection. Defendant asserts that Detective Piper's characterization of the charges as being "graphic" is a mischaracterization. Although defendant acknowledges that Detective Piper's testimony did not comprise hearsay because it involved nonassertive conduct, see *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984) ("'Acts or conduct not intended as assertive are not hearsay and, therefore, they are admissible. It should be noted that nonassertive acts or conduct are not an exception to the hearsay rule-rather, they are not hearsay in the first place.'" (citation omitted)), he contends that the testimony was more prejudicial than probative.

Even if deemed relevant, evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice is determined to exist when there is a possibility that the evidence will be attributed undue or preemptive weight by a jury, or if it would be inequitable to permit use of the evidence. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). "'This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit . . . .'" *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005) (citations omitted). Assuming arguendo that the testimony had little probative value and was substantially outweighed by undue prejudice, defendant has failed to demonstrate that its admission was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The victim and two other witnesses provided testimony regarding defendant's inappropriate sexual conduct. Based on this testimony, we do not believe that the jury would have reached a different conclusion if the testimony of Detective Piper had been excluded.

Alternatively, defendant contends that counsel's failure to object to the challenged testimony constituted ineffective assistance of counsel. To properly preserve a claim of ineffective assistance of counsel for appellate review, a defendant is required to move for a new trial or for a *Ginther*[1] hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). Because defendant raises for the first time on appeal a claim of ineffective assistance of counsel, it is not properly preserved. "A claim of ineffective assistance of counsel presents a mixed question of law and fact." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). "This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *Id*. A finding is deemed to be clearly erroneous if "the reviewing court is left with a definite and firm conviction that a mistake has been made." *Lopez*, 305 Mich App at 693 (citation and quotation marks omitted). "Where claims of ineffective assistance of counsel have not been preserved,

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

[this Court's] review is limited to errors apparent on the record." *Id*. (citations and quotation marks omitted).

"In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014) (citation and quotation marks omitted).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (citation and quotation marks omitted). "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Additionally, "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Because the evidence was admissible as nonassertive conduct, any objection by defense counsel would have been unavailing. "Trial counsel is not ineffective for failing to advocate a meritless position." *Payne*, 285 Mich App at 191. Second, given the testimony of the victim and other witnesses pertaining to defendant's behavior and sexual conduct, defendant is unable to demonstrate that, "but for counsel's alleged error[], the outcome of trial would have been different." *Id.* As a result, his claim of ineffective assistance of counsel fails.

B.

Defendant argues that the trial court erred in admitting the testimony of Rachel Ducusin because the behavior she described failed to comport with the requirements of MCL 768.27a, in that it did not comprise "a listed offense."

When an evidentiary issue has been properly preserved for appellate review, this Court reviews the trial court's decision to admit the evidence for an abuse of discretion but reviews "de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility." *Chelmicki*, 305 Mich App at 62. "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A preserved error in the admission of evidence does not warrant reversal 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.'" *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013), quoting *Lukity*, 460 Mich at 495-496 (quotation and citation omitted). Issues of statutory interpretation are also reviewed de novo. *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002).

At trial, despite defense counsel's objection, Ducusin described an incident involving defendant at their mutual workplace hospital. Ducusin related an incident where defendant

touched the genitals of a minor male patient, which she described as having no medical basis or necessity.

MCL 768.27a provides:

> (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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
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> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

As recently discussed by this Court:

> MCL 768.27a permits the prosecution to introduce any "evidence" that a criminal defendant committed "another listed offense against a minor" for any relevant purpose. Accordingly, MCL 768.27a permits the introduction of other-acts evidence that shows a defendant has a propensity to commit sex crimes against minors.
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> As we noted above, for this reason MCL 768.27a conflicts with and "supersedes" MRE 404(b), which bars evidence of a defendant's other criminal acts if that evidence is used solely to show that defendant has a propensity to commit the crime with which he is charged. MCL 768.27a specifically intends to bar the applicability of MRE 404(b) in cases that involve sexual crimes against children, as the statute aims to address "a substantive concern about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend." In other words, MRE 404(b) has no applicability to evidence that is admitted pursuant to MCL 768.27a. [*People v Uribe*, 310 Mich App 467, 479-480; 872 NW2d 511 (2015) (citations and footnotes omitted).]

In other words, "MCL 768.27a permits the admission of relevant evidence that tends to show a defendant committed a 'listed offense' under the statute. If evidence of the defendant's other acts of child sexual abuse are admissible under the mandates of MCL 768.27a, a court *must* admit the evidence without reference to or consideration of MRE 404(b)." *Id.* at 480 (citation omitted).

Defendant contends that the incident related by Ducusin does not comprise a "listed offense" because it was not demonstrated that his action was done for sexual gratification or arousal. A "listed offense" is defined by MCL 28.722(j) to comprise "a tier I, tier II, or tier III offense." In turn, MCL 28.722(w)(*v*) defines "tier III offenses" to include a violation of MCL 750.520c "committed against an individual less than 13 years of age." In accordance with this provision, a person is guilty of CSC-II "if the person engages in sexual contact with another person . . . if [t]hat other person is under 13 years age." MCL 750.520c(1)(a).[2] Sexual contact is defined as:

> [T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge.
>
> (*ii*) To inflict humiliation.
>
> (*iii*) Out of anger. [MCL 750.520a(q).]

"Intimate parts" are defined to include "the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f); see also *Uribe*, 310 Mich App at 478 n 15.

Ducusin testified that the male pediatric patient was not defendant's patient and that defendant accompanied her, uninvited, into the child's hospital room. Ducusin relates that the child's dilemma of having wet his bed was visually obvious and belying any necessity for defendant's touching the child's genital area to verify the need for a change of clothing. Based on the testimony indicating that a medical reason for the physical contact, particularly in the genital area, was absent, it was reasonable to presume that defendant's action was for "a sexual purpose."

As such, the evidence was admissible. While not articulated as such, defendant implies that the evidence was inadmissible because of the suggestion it conveys regarding defendant's propensity for sexually abusive behavior toward children, which defendant claims is unduly prejudicial. This Court has found that "other-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." *Uribe*, 310 Mich App at 482, citing *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012). In *Watkins*, our Supreme Court stated:

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[2] Defendant does not challenge the admission of the evidence premised on the age of the pediatric patient, so it is presumed that he was under the age of 13 as required by MCL 750.520c(1)(a).

> Propensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence in MRE 404(b). Yet were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a. [*Id*. at 486.]

As such, the trial court's admission of this testimony did not constitute error. Finally, even assuming admission of this testimony was in error, defendant has not established it was "more probable than not that the error was outcome determinative," *Lukity*, 460 Mich at 496, given the testimony of the victim and other witnesses regarding defendant's behavior toward the victim or other children under his supervision and training at the dojo.

C.

Defendant also asserts that the trial court erred when it permitted the victim's mother to testify regarding what the victim told her regarding defendant's abuse because it comprised hearsay. At issue is the mother's testimony that the victim told her that he was being abused by defendant and that is why he wanted to quit karate, as defendant was one of his instructors. In response to defendant's objections, the prosecutor argued that the statement was not offered to prove the truth the matter asserted and instead was to address defendant's contention that the victim's testimony was prompted or tutored.

Hearsay is defined 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." MRE 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Hearsay is inadmissible, except as specifically provided by the rules of evidence. MRE 802.

Thus, to the extent that the victim's out of court statement was used to prove the truth of the matter asserted, i.e., that defendant abused the victim at karate, the testimony would be hearsay and inadmissible. However, the prosecutor argued that the challenged testimony was not offered to prove the truth of the matter asserted but rather to place the events in context and explain the subsequent actions taken by the victim's mother. "If . . . the proponent of the evidence offers the statement for a purpose other than to prove the truth of the matter asserted, then the statement, by definition, is not hearsay." *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013); see also *People v Moorer*, 262 Mich App 64, 70-71; 683 NW2d 736 (2004). Moreover, even if admission of the testimony were to be construed as error, it was, in essence, cumulative to the testimony of the victim and the admission of the evidence did not make it "more probable than not" that the jury decided to convict. *Lukity*, 460 Mich at 496.

We note that an additional justification exists for admission of the mother's testimony. During cross-examination, defense counsel sought to elicit testimony from the victim that would suggest his explanation of events as contrived or unduly influenced by investigators. As such, a prior consistent statement made by the victim to his mother before police or investigative involvement served to rebut any implication of contrivance or fabrication and was admissible for this limited purpose. See MRE 801(d)(1)(B); *People v Verburg*, 170 Mich App 490, 497-498; 430 NW2d 775 (1988).

D.

Defendant also contends that the prosecutor improperly asked questions of Juliann Ditommaso. Ditommaso was called as a character witness on behalf of defendant. During cross-examination, the prosecutor asked whether she was aware of allegations involving defendant and his stepdaughter and whether that would alter her opinion of defendant.

Contrary to defendant's contention on appeal, the presentation of Ditommaso as a defense witness can only be construed as a character witness given her lack of any personal knowledge regarding the charged events. Defendant's contention that Ditommaso's testimony did not comprise character evidence because she only opined regarding defendant's behavior and character with regard to his specific treatment of her children is disingenuous and seeks to establish a distinction without any substantive difference. "It is a well settled rule of law in this and other jurisdictions that a witness who has testified to the defendant's good character by proof of general reputation may be questioned as to the grounds of knowledge upon which that witness's assertion is based." *People v Fields*, 93 Mich App 702, 707; 287 NW2d 325 (1979); see also MRE 405(a) ("On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct."). Because defendant placed his general reputation and character into evidence in eliciting testimony from Ditommaso, the prosecutor's questioning regarding Ditommaso's knowledge of other events in defendant's history that might affect her perception of defendant's character was not impermissible. See MRE 405(a); *People v Roupe*, 150 Mich App 469, 478; 389 NW2d 449 (1986).

II. SENTENCING ISSUES

A.

Defendant argues that the trial court erred in imposing consecutive sentences for his CSC-I and CSC-II convictions. The propriety of the imposition of a consecutive sentence constitutes a question of statutory interpretation that is reviewed de novo because "[a] consecutive sentence may be imposed only if specifically authorized by law." *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (quotation marks and citation omitted). The purpose of consecutive sentences is to deter people "from committing multiple crimes by removing the security of concurrent sentencing." *Id*. at 408. Under Michigan's CSC-I statute, "The court may order a term of imprisonment imposed under this section to be served consecutively to any term of

imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.520b(3). As explained by the *Ryan* Court:

> The term "same transaction" is not statutorily defined; however, it has developed a unique legal meaning. Accordingly, it is appropriate to examine judicial interpretations of the terminology. Two or more separate criminal offenses can occur within the "same transaction." To find otherwise would be nonsensical, as consecutive sentencing provisions such as MCL 750.520b(3), MCL 750.110a(8), and MCL 750.529a(3) would be rendered meaningless. [*Ryan*, 295 Mich App at 402 (citations omitted).]

Further, the phrase "any other criminal offense" has been found to mean "a different sentencing offense, and offenses, for purposes of sentencing, are always reduced or broken down into individual counts." *Id.* at 405.

In the circumstances of this case, the victim related acts by defendant that comprised both CSC-I and CSC-II offenses as occurring simultaneously or during the same time of contact. Specifically, the victim asserted that defendant engaged in fondling of his genital area in addition to defendant's engaging in fellatio with the victim. Although this did not occur during every incident of abuse, the victim testified that defendant would engage in various forms of inappropriate contact with the victim simultaneously or that defendant's inappropriate actions would "all happen at once." As such, the trial court's imposition of consecutive sentencing with defendant was consistent with MCL 750.520b(3).

B.

Defendant asserts that he is entitled to resentencing of his CSC-I and CSC-II convictions based on the trial court having engaged in judicial fact-finding in the scoring of OVs 3, 4, 8, 10, 11, 13, and 19. The prosecutor concedes the necessity of resentencing for defendant's CSC-II convictions but denies that defendant is entitled to resentencing regarding his CSC-I convictions premised on the imposition of the 25-year mandatory minimum sentences for these offenses.

> In [*People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015)], the Supreme Court held that in order to avoid any Sixth Amendment violations, Michigan's sentencing guidelines scheme was to be deemed advisory, instead of being mandatory. [*Id.* at 391]. The concern is that when a judge makes findings of fact "beyond facts admitted by the defendant or found by the jury" in a sentencing proceeding that increases a defendant's minimum sentence, this runs afoul of a defendant's right to a jury trial. [*Id.* at 364]. As a result, the guidelines no longer can be considered mandatory, but sentencing judges must consult the guidelines and "'take them into account when sentencing.'" [*Id.* at 391], quoting *United States v Booker*, 543 US 220, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005). [*People v Jackson (On Reconsideration)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 322350, issued December 3, 2015), slip op, p 12.]

As noted, the prosecution does not concur that defendant is entitled to resentencing regarding his CSC-I convictions because it claims that no judicial fact-finding was involved in

defendant's sentences for these convictions. We agree with the prosecution. Defendant was charged in the information with CSC-I pursuant to MCL 750.520b(2)(b), which requires defendant be 17 years of age or older and that the victim be under the age of 13. At trial, testimony was elicited confirming the ages of the victim and defendant, demonstrating that their respective ages comported with the requirements of MCL 750.520b(2)(b). In addition, when questioned by the trial court regarding his decision to not testify, defendant admitted his age at the time of trial to be "forty-nine." When instructing the jury, the trial court reiterated the necessity of determining the victim was under the age of 13 at the time the offenses occurred. The jury found defendant guilty of CSC-I under MCL 750.520b(2)(b). As a result, the jury necessarily found that defendant was 17 years of age or older and that the victim was under 13. Therefore, the 25-year minimum sentence that was mandated by statute for his CSC-I convictions, MCL 750.520b(2)(b), does not implicate judicial fact-finding, and defendant's claims to the contrary fail as a matter of law.

We now turn our attention to the claims of error with respect to defendant's sentences for his CSC-II convictions. To preserve a challenge to the scoring of OVs premised on impermissible judicial fact-finding, a defendant is required to object at sentencing to the scoring of the OVs on that basis. *Lockridge*, 498 Mich at 392-393. At sentencing, defendant did not raise any objections on these grounds. But in his motion to remand, defendant did raise objections to the scoring of OVs 4, 8, 10, and 13 premised on impermissible judicial fact-finding. Although this Court denied defendant's motion to remand, it deemed that the scoring objections raised in the motion to remand were preserved under MCR 6.429(C). *People v Norton*, unpublished order of the Court of Appeals, entered July 2, 2015 (Docket No. 324706). As such, the *Lockridge* issue before us is preserved with reference to OVs 4, 8, 10, and 13 but unpreserved with regard to OVs 3, 11, and 19. See *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (stating that an objection on one ground is insufficient to preserve an appellate attack based on a different ground).

Because defendant did not object to the scoring of OVs 3, 11, and 19 on the basis of judicial fact-finding and raised a challenge to their scoring for the first time in his appellate brief, our review is for plain error affecting substantial rights. *Lockridge*, 498 Mich at 392. However, defendant cannot establish any plain error for the scoring of these OVs, as they were all assessed 0 points. At sentencing, when defendant challenged the proposed 10-point scoring of OV 3, the trial court specifically indicated that any scoring would be speculative and instead assessed 0 points.[3] As such, we presume that defendant does not actually seek to challenge these scores based on their beneficial nature.

[3] However, we note that while the Sentencing Information Report ("SIR") for the CSC-I conviction reflects that the trial court scored OV at 0 points, the same cannot be said for the SIR for the CSC-II conviction. But the court at sentencing recognized the reduced OV score, from taking the 10 points away for OV 3, and subsequent lower guidelines range. Thus, we do not believe that the clerical error in not updating the SIR for the CSC-II conviction requires resentencing. But because we are remanding for other reasons, *infra*, the court is to update the SIR appropriately.

With respect to defendant's claim that the trial court engaged in impermissible judicial fact-finding for OVs 4, 8, 10, and 13, the prosecutor concedes that defendant is entitled to resentencing of his CSC-II convictions based on the trial court assessing 15 points each for OVs 8 and 10,[4] thus necessitating his resentencing in accordance with *Lockridge*, particularly given the trial court's imposition of consecutive sentences. We agree that resentencing for the CSC-II convictions is mandated by *Lockridge*.

OV 4 scores points for the degree of psychological injury to a victim, and the trial court scored 10 points, which is warranted if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a).

The trial court scored OV 8 at 15 points. The scoring of OV 8 is governed by MCL 777.38, which permits the assessment of 15 points when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a).

The trial court scored 10 points for OV 10. For OV 10, points can be assessed for the "exploitation of a vulnerable victim." MCL 777.40(1). Specifically, 10 points can be assessed under OV 10 if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b).

It is clear that the jury's verdict cannot account for the findings for these three OVs.[5] The jury's decision to convict for CSC-I and CSC-II did not require it to make any finding regarding the victim's psychological state, whether the victim was asported to a place of greater danger, or whether defendant "exploited" a "vulnerable victim." Therefore, it is clear that at least 35 points from defendant's total OV score were not attributable to the jury's findings, and these 35 points were responsible for increasing defendant's total OV level from III to V.[6] Thus, because the facts found by the jury verdict were insufficient to assess the minimum number of OV points

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[4] The prosecution provides no opinion on the appropriateness of the trial court's scoring of OVs 4 and 13.

[5] Whether the scoring of OV 13 constituted impermissible judicial fact-finding is not as clear. The trial court scored OV 13, which pertains to a "continuing pattern of criminal behavior," at 25 points. MCL 777.43. The scoring of 25 points is permissible if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). However, we need not offer any opinion on this particular OV because there already are sufficient grounds to remand for resentencing.

[6] The guidelines range for the OV level III is 19 to 38 months, while the guidelines range for the OV level V is 36 to 71 months. Defendant's minimum sentence for the CSC-II convictions was 71 months, which is outside the range supported by the jury's verdict. This is not to say that the court is prohibited from scoring these OVs on remand. The constitutional infirmity was the court making these findings *while being constrained to sentence within the guidelines*. After *Lockridge*, with the guidelines now being advisory, there is no constitutional issue

necessary for defendant's OV level, defendant has demonstrated potential error with respect to his CSC-II sentences. We remand for proceedings consistent with *Lockridge*, 498 Mich at 398, where the trial court is to determine whether it would have given a materially different sentence now knowing that the sentencing guidelines are advisory.

III. CONCLUSION

We affirm defendant's convictions but remand to the trial court to conduct a *Crosby*[7] hearing consistent with the Supreme Court's guidelines in *Lockridge*, 498 Mich at 398, for defendant's CSC-II sentences, including whether defendant seeks resentencing with the understanding that the sentencing guidelines are now advisory, *id.* at 399. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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