STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRETT ANTHONY CROYLE,

Defendant-Appellant.

UNPUBLISHED
October 17, 2019

No. 344450
Macomb Circuit Court
LC No. 2016-001212-FC

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant was originally charged with two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), for an act of vaginal penetration and an act of fellatio with a five-year-old child, as well as one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), for additional sexual contact with the child. Because the child could not recall vaginal penetration or the additional sexual contact during her trial testimony, the trial court acquitted defendant of those two counts on a motion for a directed verdict. Defendant was convicted of the one count of CSC I based on the allegation of fellatio, and sentenced to 25 to 40 years' imprisonment. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant's first claim on appeal is that there was insufficient evidence to support his conviction of CSC I. We disagree.

A challenge to the sufficiency of the evidence following a jury trial is reviewed de novo. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). "We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime's elements beyond a reasonable doubt." *People v Perry*, 317 Mich App 589, 599; 895 NW2d 216 (2016). "[C]ircumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime." *People v Murphy*, 321 Mich App 355, 359; 910 NW2d 374 (2017). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to

determine the weight to be accorded those inferences." *Id*. (quotation marks and citations omitted).

MCL 750.520b(1)(a) provides, in relevant part, that a "person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age." MCL 750.520a(r) defines "sexual penetration" as including "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." The jury convicted defendant based on an allegation that he committed fellatio, which occurs when there is "entry of a penis into another person's mouth." *People v Reid*, 233 Mich App 457, 480; 592 NW2d 767 (1999), citing *People v Johnson*, 432 Mich 931; 442 NW2d 625 (1989).

Defendant's challenge to the sufficiency of the evidence is that there was no actual evidence of *entry* of his penis into the victim's mouth. Defendant claims that the victim only testified that defendant urinated and put whipped cream in her mouth. We disagree. Viewing the evidence in a light most favorable to the prosecution, reasonable jurors could have concluded that fellatio occurred.

The victim testified that, when she was five years old, she and defendant were alone together when defendant told her to lie down and open her mouth. The victim described the subsequent events as follows:

> *Q*. You were five years old. Okay. And do you remember, was anything on his penis? Or I'm sorry. Was anything on the part where he pees, or was nothing on the part where he pees?
>
> *A*. Whipped cream.
>
> *Q*. You said whipped cream?
>
> *A*. Uh-huh.
>
> *Q*. How do you know it is whipped cream?
>
> *A*. Because.
>
> *Q*. Because why?
>
> *A*. I tasted it.
>
> *Q*. You tasted it? When you—when [defendant] had whipped cream on his penis, did he tell you to do anything?
>
> *A*. No.
>
> *Q*. No? He just told to you [sic] lay down?

A. Uh-huh.

Q. And then he—what did he do then, put it in your mouth?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

The victim then testified that defendant urinated in her mouth and that she spit it out on the floor.

Defendant contends that there was no evidence of actual penetration because the prosecutor only asked if defendant "put *it* in [her] mouth," and did not clarify whether "it" was defendant's penis or the whipped cream. However, because the victim testified both that she tasted the whipped cream and that defendant urinated in—not on—her mouth, the jury could infer that defendant put his penis inside her mouth. Moreover, in light of the testimony that defendant urinated in the victim's mouth during this event, and that this was the only time that defendant's body touched the victim's body, even if the victim's testimony only referenced the whipped cream—which is far from clear—reasonable jurors could still have concluded that fellatio occurred. This is particularly true considering the victim's age, as well as a forensic interviewer's testimony that five-year-olds usually lack the terminology to identify private body parts. We conclude that there was sufficient evidence to support defendant's conviction of CSC I.

II. TESTIMONY OF THE FICTIVE GRANDMOTHER

Defendant next argues that a new trial is required because of various evidentiary errors involving the testimony of the victim's fictive grandmother, Lee. Lee testified that, while the victim was being treated at a hospital for a kidney infection, Lee heard the victim tell the examining doctor that defendant touched the victim's private area. Lee also testified that the victim later told her about defendant having whipped cream on his private part. Defendant argues that this testimony constituted inadmissible other-acts evidence and hearsay. We disagree that Lee's testimony involved inadmissible other-acts evidence, and conclude that, while the statements did contain hearsay, they were properly admitted into evidence.

This Court reviews a preserved claim of evidentiary error for an abuse of discretion. *People v Gipson*, 287 Mich App 261, 262; 787 NW2d 126 (2010). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id.* "If the court's evidentiary error is nonconstitutional and preserved, then it is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome[-]determinative—i.e., that it undermined the reliability of the verdict." *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (citations and quotations marks omitted). Interpretation of the Michigan Rules of Evidence is an issue of law that this Court reviews de novo. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

First, we disagree with defendant's characterization of Lee's testimony as the type of "other-acts evidence" prohibited under MRE 404(b)(1). MRE 404(b)(1) provides:

> 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, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.

"MRE 404(b)(1) does not require exclusion of otherwise admissible evidence." *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). Rather, it prohibits "the *use* of evidence of specific acts to prove a person's character to show that the person acted in conformity with [that] character on a particular occasion." *Id*. Lee's testimony that she heard the victim tell a doctor that defendant touched her private area was not offered as evidence of defendant's "other crimes, wrongs, or acts," but rather as evidence of the crimes for which defendant was *charged*.[1] The fact that the trial court later directed a verdict of acquittal for these charges did not transform the evidence into inadmissible evidence of defendant's character. Further, Lee's testimony that the victim told her about the whipped cream on defendant's penis was direct evidence of the *charged* offense for which defendant was convicted. Thus, MRE 404(b) did not preclude the admission of Lee's testimony because her testimony did not involve evidence of other acts admitted to prove defendant's character or that defendant acted in conformity with that character.

Defendant next argues that Lee's testimony regarding the victim's statement to her doctor that defendant touched her constituted inadmissible hearsay. The prosecution concedes this point, but argues that any error in admitting the testimony was harmless. We disagree with both parties that the testimony was admitted in error, and conclude that the testimony was properly admitted under MRE 803(4).

Pursuant to MRE 801(c), " 'Hearsay' is 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 evidence is not admissible at trial unless within an established exception." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992); MRE 802. In admitting the victim's hearsay statements through Lee's testimony, the trial court relied on the exception found in MRE 803(4), which allows admission of "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

> This Court has noted that exceptions to the hearsay rule . . . are justified by the belief that the particular categories of hearsay covered by the exceptions are both necessary and inherently trustworthy. Specifically, this Court has explained that the "supporting rationale for MRE 803(4) is the existence of (1) the self-interested

[1] As noted above, defendant was originally charged but acquitted on a motion for a directed verdict of another count of CSC I and a count of CSC II.

> motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." [*Merrow v Bofferding*, 458 Mich 617, 628-629; 581 NW2d 696, 701 (1998) (citations omitted).]

Lee's testimony established that the victim was taken to the emergency room because of fever, vomiting, and lethargy, and was ultimately treated for a kidney infection. There is no dispute that the victim's statements to the treating physician were made for the purpose of medical treatment or medical diagnosis. Lee happened to be the person who took the victim to the hospital for medical treatment, and was present and heard the victim's statement to the doctor that defendant had touched her private area. The parties fail to explain—presumably based on the prosecution's concession—how MRE 803(4) does not apply under the circumstances. Nonetheless, we note that the plain language of MRE 803(4) only sets parameters regarding the purpose of the hearsay statements—namely that they were made for medical treatment or medical diagnosis. Nothing in the rule limits who may testify regarding the statements, and the parties have pointed to no legal authority creating such a limit. Absent any restrictions in MRE 803(4) regarding *who* can testify to hearsay made for the purpose of medical treatment or diagnosis, we conclude that Lee's testimony concerning the victim's statements to her doctor were properly admitted under that exception.

Moreover, even assuming arguendo that the testimony was admitted in error, we agree with the prosecution that any error in admitting Lee's testimony regarding the victim's statement was harmless. First, the testimony was cumulative of the testimony of the doctor to whom the statements were made, and notably, defendant does not challenge the admissibility of the doctor's testimony. Second, defendant was free to cross-examine the victim about Lee's testimony. "[I]f the declarant . . . testifie[s] at trial, 'any likelihood of prejudice [i]s greatly diminished' because 'the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements[.]" *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010) (citations omitted and alteration in original). Lastly, we note that Lee's testimony regarding the victim's statement that she was touched by the defendant related to the sexual contact allegation—the CSC II charge. Because the victim did not recall that allegation during her own testimony, the trial court dismissed that charge. Thus, the victim's statements at the hospital did not reference conduct related to defendant's ultimate conviction, which was based on an act of fellatio. Under these circumstances, any error related to the admission of Lee's testimony did not undermine the reliability of the jury's verdict.

Lastly, defendant contends that Lee's testimony regarding how and when she learned about defendant having whipped cream on his penis also constituted inadmissible hearsay. While this testimony does not fall within any exception to the hearsay rule, we note that the admission of otherwise inadmissible hearsay is not error requiring reversal if the complaining party has opened the door to its use. See, e.g., *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003) ("[u]nder the doctrine of fair response, there is no error because a party is entitled to fairly respond to issues raised by the other party"); *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) (prejudicial testimony does not warrant reversal when the defendant "opened the door" to the testimony); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003) (otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense). During Lee's cross-examination, defense counsel

asked if she remembered a past conversation she had with a detective, and whether she used the phrase "whipped cream" in that conversation. Lee responded that she had. Defense counsel then elicited from Lee that she never heard the victim make references to "whipped cream" at the hospital. On redirect examination, the prosecutor elicited Lee's testimony that "[t]he only time I heard anything about whipped cream was when [the victim] told me what had happened, what she says happened between [defendant] and her." Given that defendant opened the door to the testimony regarding Lee's knowledge of an incident involving whipped cream, Lee's testimony on redirect examination regarding that reference does not require reversal.

III. CARE HOUSE INTERVIEW

Defendant next contends that the trial court abused its discretion by admitting the testimony of the victim's forensic interviewer, Solomon, who was employed at a child advocacy center known as Care House. Specifically, defendant contends that it was irrelevant for Solomon to testify about the victim's demeanor during the interview, and contends in the alternative that the testimony was unduly prejudicial. We disagree.

Again, we review this claim of evidentiary error for an abuse of discretion. *Gipson*, 287 Mich App at 262. MRE 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

When asked about the victim's demeanor during her forensic interview, Solomon responded that the victim was forthcoming, engaged, and cooperative. The prosecutor properly elicited testimony regarding the victim's demeanor because it was rationally based on Solomon's perception of the victim during the interview, and defense counsel had placed the victim's truthfulness into dispute at trial. See *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod 433 Mich 862 (1989) (a police officer may comment on a defendant's demeanor during an interview).[2] Accordingly, defendant's argument that Solomon's testimony was irrelevant is without merit.

[2] We recognize our Supreme Court's recent decision in *People v Thorpe*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 156777 and 157404); slip op at 2, wherein the Court held that it was improper for an expert in the area of child sexual abuse to testify regarding the "rate of false reports of child sexual abuse by children to rebut testimony . . . that children can lie and manipulate." The Court further held that it was improper for an examining physician to

Defendant argues in the alternative that Solomon's testimony was unduly prejudicial. MRE 403 provides that admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "The 'unfair prejudice' language of MRE 403 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, e.g., the jury's bias, sympathy, anger, or shock." *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (quotation marks and citations omitted). "[A]dmission of [e]vidence is unfairly prejudicial when . . . [the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. (quotation marks and citation omitted; alteration in original).

Defendant's argument concerning MRE 403 seems to be premised on the idea that the jury may have inferred the substance of the interview—which Solomon did not testify about because it would have constituted hearsay—from the idea that the prosecution's case would not have moved forward had Care House not "put their stamp of approval on it." Of course, while this idea is certainly prejudicial, we would also think it highly probative. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) ("All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible."). Without further explanation as to how the probative value of Solomon's testimony was "*substantially outweighed* by the danger of unfair prejudice," we simply cannot conclude that it should have been excluded under MRE 403. *Id*. See also *People v Van Tubbergen*, 249 Mich App 354, 374; 642 NW2d 368 (2002) ("Issues insufficiently briefed are deemed abandoned on appeal.") Solomon testified about her training, the protocol of conducting forensic interviews, the purpose of the interview, and the manner in which she conducts said interviews. As noted by the prosecution, Solomon never improperly vouched for the victim or offered an opinion about defendant's guilt or innocence. See *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012). We can ascertain no point in her testimony at which the danger of unfair prejudice might have outweighed—let alone substantially outweighed—its probative value.

IV. MISTRIAL

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improperly interfere with the role of the jury by "vouch[ing] for the complainant's veracity." *Id*. We do not find *Thorpe* applicable. In *Thorpe*, one expert testified, without providing supporting evidence, that "children only lie about sexual abuse 2% to 4% of the time," and in a consolidated case, another expert testified that she performed an examination on a victim and found no physical evidence of sexual assault, but based on the victim's testimony, she still believed there was "probable pediatric sexual abuse." *Id*. at ___; slip op at 26, 31. In this case, not only was Solomon not an expert, but she made no insinuations as to the victim's credibility, let alone explicit remarks like the ones made in *Thorpe*. Solomon testified to the victim's demeanor and left it for the jury to determine what that demeanor meant. This is not the equivalent of *Thorpe*'s "probable pediatric sexual abuse," and accordingly, we respectfully disagree with our dissenting colleague's conclusion that *Thorpe* controls the outcome of this case.

Defendant next argues that the trial court should have sua sponte granted a mistrial after the prosecution asked the testifying detective at what point he "bec[a]me aware of allegations of penetration," and the detective responded, "[a]t the Care House interview." As Solomon did not testify regarding any of the victim's specific statements at the Care House interview, defendant argues that the revelation that an allegation of penetration was made during the interview was inadmissible hearsay that violated his right to a fair trial. Defendant has waived this issue.

After defense counsel objected to the prosecutor's question, the parties held a conference at the bench. When the objection was later discussed outside the presence of the jury, the prosecutor explained that the question had not been offered for the truth of the matter asserted, but to explain how the information affected the officer's investigation. The trial court noted that although the question would reveal what the officer did next, it also revealed specific content disclosed by the victim at the Care House interview. Based upon that fact, the court sustained the objection and offered to provide a curative instruction. Defense counsel stated, however, that he preferred not to remind the jury of the information with a curative instruction and agreed to "let it lie."

"Waiver has been defined as the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). "If any rights are waived under a rule, appellate review of a claimed deprivation of those rights is foreclosed because the waiver has extinguished any error." *People v Adams*, 245 Mich App 226, 240; 627 NW2d 623 (2001). In *Carter*, 462 Mich at 215, our Supreme Court found that because a defendant's counsel expressed satisfaction with the trial court's jury instructions, the defendant waived any error regarding the instructions on appeal. In this case, we hold that defense counsel's express decision to "let [any error] lie" extinguished any claim that the trial court erred by not granting a mistrial sua sponte.

Defendant alternatively argues that his counsel was ineffective for failing to request a mistrial. We disagree. This Court reviews de novo the constitutional question whether defendant was deprived of his right to the effective assistance of counsel. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Because defendant did not raise this ineffective-assistance claim in an appropriate motion in the trial court, our review of this claim is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 US at 694.

"A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010) (quotation marks and citation omitted). "An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted, does not constitute hearsay under MRE 801(c)." *People v Gaines*, 306 Mich App 289, 306-307; 856 NW2d 222 (2014). In this case, the prosecutor did not offer the challenged testimony to establish the truth of the matter asserted (i.e., to prove penetration); rather, it was offered to show what the detective did next in his investigation, or more specifically, to show the effect of the allegation on the detective. Thus, the detective's testimony did not constitute inadmissible hearsay, and defendant has failed to establish any prejudicial irregularity that would have warranted a motion for a mistrial. Moreover, to the extent that the testimony could have been viewed as having an improper hearsay purpose, a curative instruction, as offered by the court, would have been sufficient to cure any perceived prejudice. Therefore, any request for a mistrial by defense counsel would have been futile. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Furthermore, defendant cannot establish that the outcome of the proceedings would have been different but for this particular line of questioning. The record showed that the victim did not make any allegations of penetration when she first discussed the abuse at the hospital. Rather, as the detective testified, he only learned about penetration more than six weeks later at the Care House interview. Defense counsel actually relied on the detective's testimony to demonstrate an inconsistency and argued that the victim's story had changed between the hospital and the Care House interview, and again later at the preliminary examination. Defense counsel argued that the victim was influenced by Lee. Moreover, despite this attack on the victim's credibility, the prosecutor did not counter that the victim's revelation at the Care House interview corroborated her trial testimony. Particularly in light of defense counsel's—and not the prosecutor's—reliance on the challenged testimony in the credibility contest between the victim and defendant, defendant has not shown a reasonable probability that, but for a failure to move for a mistrial, the outcome of the case would have been different.

V. PROSECUTORIAL MISCONDUCT

Defendant next argues that he is entitled to a new trial because the prosecutor committed misconduct during defendant's cross-examination. Defendant further adds that defense counsel was ineffective for failing to object to the prosecutorial misconduct and for failing to request a curative instruction. We disagree.

Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved. *People v Abraham,* 256 Mich App 265, 274, 662 NW2d 836 (2003). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014). An error is plain if it is clear or obvious, and an error affects substantial rights if it is prejudicial, i.e., if it affects the outcome of the proceedings. *Jones*, 468 Mich at 355. "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, independent of defendant's innocence." *People v Ackerman,* 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Reversal

is not required if a jury instruction could have cured any error. *Id.* at 449. "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App at 63.

Defendant argues that the prosecutor (1) improperly cross-examined him regarding whether "most kids" lie about penetration, which he argues mischaracterized the evidence "by presuming that [the victim] had testified about 'penetration,' " and (2) improperly cross-examined him about whether the victim was lying. Defendant's two prosecutorial misconduct claims stem from the following line of questioning:

> *Q*. Let's talk about your interview with the detective. You called [the victim] a liar; is that correct?
>
> *A*. Well, yeah.
>
> *Q*. Tell us about how [the victim] lies.
>
> *A*. Like any, or most children, she can make up stories about being kicked downstairs or tripping or all sorts of little things.
>
> *Q*. And how do you know about what most kids are lying about?
>
> *A*. I have met more than one child.
>
> *Q*. Okay. And do most kids lie about a grown man sticking his penis inside of their mouth and peeing in their mouth?
>
> *A*. I do not know.
>
> *Q*. Do most kids lie about a grown man putting whipped cream on his penis and putting it in her mouth.
>
> *A*. I do not know.

First, in defendant's police interview, he accused the victim of being a liar. The prosecutor was entitled to explore the basis for that claim on cross-examination. Moreover, as discussed earlier, the jury could reasonably conclude from the victim's testimony that defendant put his penis inside her mouth. The prosecutor was therefore free to rely on the victim's testimony to question defendant about the credibility of his own testimony that "most children . . . make up stories." This did not require a mischaracterization of the victim's testimony.

Second, the prosecutor did not ask defendant on cross-examination whether the victim was lying. Rather, the prosecutor asked defendant to explain his own statement to the police that the victim was a liar. It is "generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). But here, defendant's prior accusation that the victim was a liar opened the door to this questioning by the prosecutor.

Jones, 468 Mich at 352-353 n 6; *Pickens*, 446 Mich at 336-337; *Callon*, 256 Mich App at 329. Therefore, the prosecutor's questioning was not improper. In addition, because the prosecutor's questioning did not amount to misconduct, defense counsel was not ineffective for failing to raise a meritless objection. *Ericksen*, 288 Mich App at 201.

VI. MANDATORY 25-YEAR MINIMUM SENTENCE

Lastly, defendant argues, as he did below, that his mandatory 25-year minimum sentence pursuant to MCL 750.520b(2) is disproportionate and constitutes cruel or unusual punishment. In *People v Benton*, 294 Mich App 191, 203-207; 830 NW2d 800 (2011), the defendant made the same claim that defendant makes here. This Court rejected the defendant's argument, explaining that Michigan's mandatory sentence for CSC I with a victim under 13 years of age was not cruel or unusual punishment. *Id.* at 207. Defendant concedes[3] that we are bound to follow our decision in *Benton*, MCR 7.215(J)(1), and in any event, we are not persuaded that *Benton* was wrongly decided.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer

[3] Defendant notes in his brief on appeal that he raises this issue only to preserve it for an appeal to the Michigan Supreme Court.