STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ANTHONY LEE,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 349920
Wayne Circuit Court
LC No. 19-000780-01-FC

Before: GADOLA, P.J., and JANSEN and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of five counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (penetration with person under 13),[1] and was sentenced to 25 to 60 years' imprisonment. Defendant appeals as of right, raising numerous challenges to his convictions and sentence. We affirm.

I. FACTS

This case arises from allegations of sexual assault made by defendant's niece, IH. In October 2016, IH, then age seven, moved into the home of her aunt, Courtney Carr, and defendant. At that time, Carr and defendant were married, and the couple lived together with their three young children. IH commonly slept in the same bed with Carr and defendant; she testified that one night while in bed with Carr and defendant, she felt defendant's private part touch her bottom. The next day, defendant took her outside and told her that if she wanted to live there and get a Minecraft video game she would have to "follow through" with what he did to her.

IH testified that thereafter defendant sexually assaulted her on multiple occasions. She testified that after the family moved to a different house in October 2017, defendant continued to sexually assault her, primarily involving defendant putting "his front private part in [her] vagina."

[1] Defendant was charged with six counts of CSC-I; the trial court granted a directed verdict with respect to one count.

IH testified that this happened on the couch in the living room, in Carr's bedroom, and in IH's bedroom. She described a specific assault that occurred in the summer of 2018 when defendant called her into the living room and told her to take her clothes off. IH testified that defendant put his penis in her vagina, and that it was very painful and she cried out and begged defendant to stop. IH alleged that defendant also put his private part in her mouth and her butt. When IH went to the bathroom afterwards, she saw blood coming out of her vagina and it burned when she urinated. Defendant cleaned up the blood from the couch and the bathroom floor. IH testified that she told Carr about the bleeding when Carr got home from work, but did not disclose that defendant had assaulted her.

Carr testified that one day in the summer of 2018, defendant called her at work to tell her that IH was bleeding and suggested that IH had gotten her first period. Carr was concerned, but concluded that defendant's theory about IH's period could be correct given her age. Carr testified that when she got home she suggested that they take IH to the hospital, but that defendant became angry and accused Carr of suggesting that he was a child molester.

Carr and defendant separated on September 3, 2018. When Carr told IH that defendant would not be returning to the home, IH used her tablet to disclose defendant's abuse to Carr, writing, "[H]e put his P thing in my vagina." IH told Carr that the abuse had been ongoing and that defendant had assaulted her the day that she had been bleeding.

Carr reported IH's allegations to the police, and the next day Carr gave the police two cell phones that belonged to defendant. One of the phones was an iPhone that Carr testified defendant used for personal use. She testified that she knew the password to the iPhone, but that she did not often use that phone and that defendant had not been willing to allow others to use the iPhone. By contrast, defendant testified that he permitted others in the family to use the iPhone, and that sometimes the children in the home played with the phone. He testified that although it was password protected, he usually set the phone on "sleep" mode so that the phone could be used without re-entering the password. He testified that he often left the iPhone on the coffee table where others had access to it, and placed it on the kitchen table or another table to charge it, where again, other family members had access to it.

The police obtained warrants to search the information contained in the phones. Upon searching the iPhone, police discovered that the phone's internet search history included a search for the phrase "raped kids" on July 31, 2018, and another search for "kids getting raped videos" on August 29, 2018. The search history also revealed that in the same general time frame, the device had been used to access several pornography websites.

The medical records from IH's examination at Children's Hospital were admitted without objection. According to the medical records, IH came to the hospital for an examination because defendant "forced her to have sex with his penis" two or three weeks earlier. The examination did not yield any significant physical findings. Jessica Ojala, an expert in sexual assault nurse examination, testified that the lack of physical findings did not preclude the possibility of sexual assault involving penetration.

Defendant denied IH's allegations. He testified that the day IH was bleeding he found her in the bathroom with her pants around her thighs, visibly upset. Defendant testified that he and

Carr earlier had discovered IH masturbating, and he concluded that she had inadvertently hurt herself or perhaps had started her period. Defendant cleaned up the blood from the bathroom floor, getting some of the blood on his shirt in the process. Defendant testified that he opposed Carr's suggestion that they take IH to the hospital because of the expense. During cross-examination, the prosecution confronted defendant with earlier statements he made to police and to the child protective services worker, emphasizing inconsistencies. The jury found defendant guilty of three counts of CSC-I involving vaginal penetration and two counts of CSC-I involving oral penetration. This appeal followed.

II. DISCUSSION

A. SEARCH OF THE IPHONE

Defendant contends that the trial court erred by allowing the admission into evidence of the search history discovered by police while searching his iPhone.[2] He argues that the affidavit supporting the warrant used to obtain the information did not demonstrate facts to establish a link between the iPhone and the alleged criminal activity, and thus did not demonstrate probable cause to search the iPhone. The prosecution concedes that the warrant was not supported by probable cause to search the iPhone for internet searches, but contends that the introduction of the evidence discovered on the iPhone was harmless error. We conclude that the introduction of the search history discovered on the iPhone was not error because the search of the iPhone was conducted pursuant to valid consent.

1. PRESERVATION/STANDARD OF REVIEW

We observe initially that defendant's evidentiary challenge is unpreserved. To preserve an evidentiary issue for review on appeal, the party opposing the admission of evidence must challenge the admission of the evidence before the trial court asserting the same basis for objection thereafter asserted on appeal. *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). Specifically, a defendant who challenges the admissibility of evidence on Fourth Amendment grounds must object to the admission of the evidence before the trial court on that same basis. *People v Hughes*, 506 Mich 512, 522-523; 958 NW2d 98 (2020).

Although defendant in this case opposed admission of the iPhone search history, he did not challenge the evidence on the Fourth Amendment grounds now asserted on appeal. We review unpreserved claims of error for plain error. *Id*. Under the plain error rule, the defendant bears the burden of establishing that plain error occurred affecting his or her substantial rights. *Id*. at 523 n 4. Reversal is warranted only when "the forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 523-524 n 4. We also observe that under MCL 769.26, "[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion

[2] Defendant challenges the affidavits and search warrants issued for both cell phones, but the prosecution introduced only evidence discovered in the search of defendant's iPhone.

of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

2. PROBABLE CAUSE

Both the United States and Michigan Constitutions guarantee the right of persons to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Hughes (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 338030); slip op at 5. Thus, whether a search is lawful depends upon whether it is reasonable. *People v Mahdi*, 317 Mich App 446, 457; 894 NW2d 732 (2016). Generally, a search conducted without a warrant and without probable cause to believe that evidence of wrongdoing might be located at the place to be searched is per se unreasonable. *Id*. at 458. Absent circumstances falling within an exception to the warrant requirement, when evidence is obtained in contravention of the constitutional protection against unreasonable searches, under the judicially created exclusionary rule the evidence must be excluded. *Hughes*, ___ Mich App at ___; slip op at 5.

A search warrant must "particularly describ[e] the place to be searched and the persons or things to be seized," US Const, Am IV, as well as the alleged criminal activity that justifies the warrant. *Hughes*, 506 Mich at 538. A search warrant and the affidavit supporting the warrant also must provide some context that connects the particularized venue to be searched and the objects to be seized with the suspected criminal behavior. *Id*. "There must, of course, be a nexus . . . between the item to be seized and criminal behavior. Thus . . . , probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id*. at 538-539, quoting *Warden v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967). The Fourth Amendment protection against unreasonable searches and seizures extends to cell phones, *Hughes*, 506 Mich at 527, and "as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be 'reasonably directed at uncovering' evidence of the criminal activity alleged in the warrant." *Id*., 506 Mich at 538 (citation omitted).

When assessing a magistrate's conclusion that probable cause to search existed, we consider the underlying affidavit in a "common sense and realistic manner," *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992), and inquire "whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *Id*. at 603. In this case, the affidavit supporting the search warrant for defendant's iPhone contained the following assertions:

> 1. Affiant is a Redford Township Police Officer currently assigned to the Detective Bureau, whose duties include armed robbery, home invasion, criminal sexual conduct, death investigations and crimes against person(s).
>
> 2. On 09/03/2018 around 2036 hours Courtney Carr came into the Redford Police Station to report a CSC. Courtney sad [sic] her husband [defendant] sexual [sic] assaulted her 9 year old niece [IH]. [IH] lives with [defendant] and Carr . . . . [IH] disclosed to Carr that [defendant] had sexually assaulted her on multiple occasions. [IH] could not verbally talk about the assaults so she wrote it down on her tablet. [IH] wrote "he put his pee thing in her vagina".

3. Carr separated [IH] from the other children.

4. [IH] said the first sexual assault happened with [defendant] in Monroe at their old residence . . . . [Defendant] told [IH] if she wanted the Minecraft game she asked for then she would have to follow through with things.

5. The next sexual assault occurred in the Redford house . . . . [IH] said the next time she was sexually assaulted was in Carr and [defendant's] bedroom.

6. The next time she was sexually assaulted [defendant] called [IH] into the living room. [Defendant] told [IH] to lay on the couch. [Defendant] tried forcing her legs open. [IH] tried closing her legs. [IH] told [defendant] multiple times to stop. [Defendant] stuck his "pee thing" in [IH's] vagina. [IH's] vagina was bleeding and she told [defendant] multiple times that it hurt. [IH] told [defendant] she had to pee and [defendant] told her just to go on the couch. [IH] said after the sexual assault her vagina burned when she peed.

7. [Defendant] called Carr on the phone and told her [IH] went into the bathroom and started bleeding. Carr advised Affiant that [IH] does not get a period yet.

8. [IH] said it happened one more time and it did not hurt the last time.

9. On 09/04/2018 around 1405 hours [IH] was interviewed at the Southgate Kids Talk location. [IH] disclosed multiple sexual assaults. [IH] disclosed the time she was on the couch white stuff came out of [defendant's] penis and landed on the floor. While Affiant was at the Kids Talk Carr turned over two cell phones that belong to [defendant].

10. On 09/06/2018 around 0945 hours Affiant went to [defendant and Carr's residence] with Officer Pasciak. Courtney Carr signed a consent search for the house. Affiant took photographs of the scene. Carr turned over two t-shirts that were alike. Carr said [defendant] wiped up [IH's] blood with one of the t-shirts. Carr already washed the shirts. Carr showed me a floor mat next to the toilet that had some possible blood on the bottom. Affiant collected the floor mat, carpet under couch[,] [t]he two t-shirts[,] and Carr turned the tablet over to Affiant that [IH] used to disclose the sexual assaults.

11. Affiant has probable cause to believe the listed item to be searched will be found.

The resulting warrant allowed the police to seize electronically-stored information from defendant's iPhone. When the warrant was executed, police discovered a history of internet searches for "kids getting raped videos" and "raped kids." The evidence that these search histories had been discovered on the iPhone was admitted at trial.

Defendant contends that the assertions of the affidavit supporting the warrant do not connect the alleged criminal conduct to defendant's iPhone and do not articulate the evidence to be sought on the device. Defendant argues that the affidavit therefore does not establish probable

cause, "which exists when there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place." *People v James*, 327 Mich App 79, 90; ___ NW2d ___ (2019) (quotation marks and citation omitted). We agree. Although the affidavit contained sufficient evidence for the magistrate to conclude that probable cause existed that a crime had been committed, there were no allegations to support a fair probability that a search of data from defendant's iPhone would reveal evidence of the alleged crime.

Evidence seized pursuant to a warrant that is subsequently determined to be invalid for lack of probable cause is generally inadmissible as substantive evidence in criminal proceedings under the exclusionary rule. *Hughes*, ___ Mich App at ___; slip op at 5. The exclusionary rule should be applied case by case, however, and only when exclusion of evidence would further the purpose of the rule, being to deter police misconduct. *People v Goldston*, 470 Mich 523, 543; 682 NW2d 479 (2004). A good faith exception exists when the police acted in reasonable reliance on a presumptively valid search warrant; the purpose of deterring police misconduct "would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant." *Id*. at 526. Under the good faith exception to the exclusionary rule, police reliance on a warrant that later is invalidated for lack of probable cause is reasonable unless (1) the magistrate was misled by false information in the affidavit that the affiant knew was false or because the affiant recklessly disregarded the truth, (2) the issuing magistrate wholly abandoned his or her judicial role in issuing the warrant, or (3) the warrant relied upon was based on a "bare bones" affidavit so lacking in probable cause as to render official belief in the existence of probable cause unreasonable. *People v Czuprynski*, 325 Mich App 449, 472; 926 NW2d 282 (2018).

Here, the officers relied on a facially valid warrant when searching defendant's iPhone and presumably trusted the issuing judge's determination that probable cause had been sufficiently established. The warrant, however, was based upon an affidavit that failed to assert any connection between the alleged crimes and the iPhone. For example, the affidavit does not assert that defendant used the iPhone to exchange text messages with the victim or to store images of the criminal conduct, or otherwise support a reason to believe that there was evidence related to the alleged crimes on the iPhone. The affidavit therefore was a "bare bones" affidavit lacking in probable cause and thus was inadequate to support a search of the iPhone.

However, in this case the search falls within a recognized exception to the search warrant requirement because it was conducted pursuant to valid consent. The Fourth Amendment prohibits only unreasonable searches, and a search based upon consent typically is reasonable. *People v Mead*, 503 Mich 205, 215; 931 NW2d 557 (2019). Consent is an exception to the warrant requirement if the consent is freely and voluntarily given by the person whose property is searched or by a third person possessing common authority, or apparent common authority, over the property. *Id*. at 216-217. Common authority over property is based on "mutual use of the property by persons generally having joint access or control for most purposes." *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008), quoting *United States v Matlock*, 415 US 164, 171 n 7; 94 S Ct 988; 39 L Ed 2d 242 (1974).

In this case, on or about September 3, 2018, Carr and defendant separated, apparently amidst allegations of domestic violence. Although the record is not clear regarding the details of defendant's departure from the home, it appears that he left suddenly and apparently in police custody, leaving the cell phones in the home with Carr. After IH disclosed to Carr defendant's

sexual abuse, Carr informed the police and gave the cell phones to the police. Carr testified that defendant used the iPhone for personal use, that she knew the password to the iPhone, and that she used the iPhone on occasion, though not frequently. Defendant testified that he allowed his family members to use the iPhone and that he regularly made the iPhone accessible to the family by leaving it on the coffee table and the kitchen table in "sleep" mode so that the password did not have to be reentered. The record thus establishes that Carr had joint access to the iPhone, enjoyed mutual use of the phone, and had control of the iPhone to the extent that defendant routinely left the phone in the common areas of the home with the intention that she and other family members use it. Given that Carr had "mutual use of the property" and had "joint access or control for most purposes," *Brown*, 279 Mich App 116, 131, we conclude that she had common authority of the iPhone and the police search of the iPhone was conducted pursuant to valid consent. Because we conclude that the search was valid, we reject defendant's additional argument that defense counsel's failure to object to the admission of the search history on the basis of lack of probable cause was ineffective assistance of counsel. See *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018).

B. MCL 768.27a

Defendant also contends that the search history from his iPhone was not admissible under MCL 768.27a. We review the trial court's decision regarding the admissibility of evidence for an abuse of discretion, which occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Burger*, 331 Mich App 504, 510; 953 NW2d 424 (2020).

Before trial, the trial court granted the prosecution's motion to admit the search history from the iPhone that demonstrated that the phone was used to search the terms "kids getting raped videos" and "raped kids." When a defendant is charged with a listed offense against a minor, MCL 768.27a governs the admissibility of evidence that the defendant committed other listed offenses against a minor. *People v Watkins*, 491 Mich 450, 455; 818 NW2d 296 (2012). A listed offense is a Tier I, Tier II, or Tier III offense under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. MCL 768.27a(2)(a); MCL 28.722(i). In this case, defendant was charged with CSC-I of a minor, a Tier III offense, MCL 28.722(v)(*iv*); the other acts at issue were the internet searches for "raped kids" and "kids getting raped videos," which could be characterized as an attempt to possess child sexually abusive material in violation of MCL 750.145c(4), which is a Tier I offense. MCL 28.722(r)(*i*) and (*ix*). Because this evidence falls within the scope of the statute,[3] it was admissible and could be "considered for its bearing on any matter to which it is relevant," MCL 768.27a(1), including the defendant's propensity to commit the acts at issue. *Watkins*, 491 Mich at 470-471.

Notwithstanding the general admissibility of evidence under MCL 768.27a(1), it may still be subject to exclusion under MRE 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Watkins*, 491 Mich at 481, quoting MRE 403 (quotation marks omitted). Although propensity evidence is recognized

[3] Because this evidence fell within the scope of MCL 768.27a, MRE 404(b) was inapplicable. Defendant's argument under MRE 404(b) is therefore misplaced. See *Watkins*, 491 Mich at 470.

as prejudicial, to give effect to the Legislature's intent in enacting MCL 768.27a the propensity inference must be weighed in favor of the probative value of the evidence. *Watkins*, 491 Mich at 486-487. In applying MRE 403, courts should consider the following nonexhaustive list of factors:

> (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. [*Id*. at 487-488.]

In this case, the trial court determined that the evidence of the search history was not subject to exclusion under MRE 403. The trial court's ruling was not outside the range of principled outcomes. The act of searching for these phrases and the charged CSC-I offenses both involve sexual interest in minors, the searches took place in the same time frame as certain of the alleged assaults, the internet searches were conducted on the iPhone defendant regularly used, and the evidence was needed to support the victim's testimony, as there was little in the way of physical evidence to support the charges. Defendant has not established that the trial court abused its discretion by allowing the prosecution to admit the internet search history under MCL 768.27a.

C. PROSECUTORIAL ERROR

Defendant raises several claims of prosecutorial error, and relatedly, that he was denied the effective assistance of counsel. A claim of prosecutorial error must be preserved by contemporaneously and specifically objecting. *People v Clark*, 330 Mich App 392, 433; 948 NW2d 604 (2019). Here, although defense counsel objected that the prosecutor had shifted the burden of proof, he did not request a curative instruction or object to the other asserted errors. Defendant's prosecutorial error claims are therefore largely unpreserved, and we review this issue for outcome-determinative, plain error affecting substantial rights. *Id*. Even if the challenges were preserved, however, we conclude that no prosecutorial error occurred.

Defendant argues that the prosecution improperly shifted the burden of proof by questioning him about his failure to produce certain evidence and by commenting on the absence of corroborating evidence in closing argument. See *People v Henry*, 315 Mich App 130, 150; 889 NW2d 1 (2016) (a prosecutor may not imply that the defendant has the burden of proof). The prosecutor does not impermissibly shift the burden of proof, however, by challenging the weight of the evidence and credibility of the witnesses presented by the defense. *People v Fields*, 450 Mich 94, 107, 115; 538 NW2d 356 (1995). In this case, the prosecution challenged inconsistencies in defendant's account of the alleged events, questioning why defendant did not introduce evidence to support his testimony or provide consistent information to the investigating officers. These questions permissibly challenged the weight and credibility of defendant's testimony. *Id*.

Defendant also asserts that during the prosecution's closing argument the prosecutor vouched for witness credibility and argued facts not in evidence. Generally, the prosecution is given great latitude in its arguments at trial, *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017), and a prosecutor may argue all reasonable inferences arising from the evidence introduced at trial. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Although a prosecutor may not vouch for the credibility of a witness, *People v Reed*, 449 Mich 375, 398; 535

NW2d 496 (1995), the prosecutor is free to argue from the facts that a witness is or is not credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, the prosecutor's arguments must be reviewed in the context of the defense arguments. *Mullins*, 322 Mich App at 172.

In this case, the prosecutor noted during closing argument that IH's demeanor suggested that she was trying to understand the questions and to answer truthfully, and had no reason to lie. This argument by the prosecutor was in response to defendant's theory of the case that IH had invented the allegations against defendant. The prosecution also argued that Carr's answers to questions suggested that she was being truthful regarding why IH had been allowed to sleep with defendant and Carr. Considered in context, none of the prosecution's challenged remarks improperly vouched for witness credibility, argued facts not in evidence, or mischaracterized witness testimony. We also reject defendant's contentions that his trial counsel was ineffective for failing to raise these futile objections. See *Head*, 323 Mich App at 539.

D. EXPERT TESTIMONY

Defendant next contends that the trial court abused its discretion by admitting the testimony of Jessica Ojala, who testified as an expert witness in sexual assault nurse examination. Defendant argues that Ojala improperly vouched for IH. Defendant did not object to Ojala's testimony below, and we therefore review defendant's unpreserved challenge for plain error affecting defendant's substantial rights. See *Thorpe*, 504 Mich at 252.

In a case alleging child sexual abuse, an expert witness may not vouch for the veracity of a victim, nor testify that the sexual abuse occurred, nor testify regarding whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). An expert witness may testify in the prosecution's case in chief, however, "regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim," and regarding "the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id*. at 352-353. In this case, IH's emergency room examination did not yield physical findings to corroborate her allegations. Ojala, who was not the examining physician, testified that the absence of visible injury was not inconsistent with sexual abuse involving penetration. Ojala did not express or imply an opinion about the veracity of IH's allegations, but instead testified regarding why a medical examination performed several days after an alleged assault might not reveal physical findings. Ojala's testimony did not constitute improper vouching.

We also reject defendant's unpreserved claim that Ojala's testimony was inadmissible because it was not reliable. Expert testimony must be based upon "reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012), citing MRE 702. Although defendant contends that Ojala did not establish the basis for her opinion about the infrequency of discovering injuries in sexual assault victims, our review of the record reveals no support for defendant's contention that Ojala's testimony was unreliable. Ojala outlined her education, relevant employment history, and experience performing over 600 sexual assault examinations, and she was qualified as an expert in sexual assault nurse examinations by stipulation. With respect to her testimony that physical

evidence of sexual assault was discovered in less than 10% of cases, Ojala indicated that the statistical figure was derived from her experience. We also reject defendant's contention that his counsel was ineffective for failing to object to or investigate the asserted errors because defense counsel was not obligated to raise futile objections. See *Head*, 323 Mich App at 539.

E. ADMISSIBILITY OF CPS REPORT

Defendant next argues that the trial court abused its discretion by admitting a Child Protective Services (CPS) report under MRE 803(6). We agree that the report did not qualify for admission under MRE 803(6), but conclude that the error did not result in a miscarriage of justice.

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." MRE 801(c). Hearsay generally is inadmissible, subject to several exceptions. *People v Duncan*, 494 Mich 713, 724; 835 NW2d 399 (2013). One such exception, commonly known as the business-records exception, allows admission of records of regularly conducted activity, including hearsay statements, regardless of the declarant's availability as a witness. MRE 803(6). The exception does not apply to a record prepared in anticipation of litigation, however, because the inherent trustworthiness of business records can no longer be presumed in those circumstances. *People v Jambor (On Remand)*, 273 Mich App 477, 482; 729 NW2d 569 (2007).

In this case, CPS investigator Steffany Butler interviewed defendant and prepared a report in the course of investigating allegations against defendant. Because the report was an adversarial record made in anticipation of litigation, it was not admissible under MRE 803(6). However, a preserved evidentiary error is not grounds for reversal unless the defendant establishes that the error more probably than not resulted in a miscarriage of justice, *Thorpe*, 504 Mich at 252, which defendant has not established. The redacted CPS report summarized what defendant told Butler when she interviewed him about IH's allegations. A party's own statements are explicitly excluded from the definition of hearsay by MRE 801(d)(2)(A). As such, Butler could have testified about the substance of the report, even if the report itself should have been excluded from evidence. Defendant failed to establish a miscarriage of justice by the admission of the report.

F. SENTENCING

Defendant contends that the registration and lifetime electronic monitoring requirements of SORA constitute cruel and/or unusual punishment and also constitute an unreasonable and unconstitutional search. Defendant acknowledges that each of his sentencing arguments is controlled by binding precedent that is contrary to his positions. See *People v Tucker*, 312 Mich App 645, 682-683; 879 NW2d 906 (2015) (SORA reporting requirements are not punishment); *People v Hallak*, 310 Mich App 555, 577-579; 873 NW2d 811 (2015), rev'd in part on other grounds 499 Mich 879 (2016) (lifetime electronic monitoring is not cruel and/or unusual punishment, nor unreasonable search and seizure). Defendant's contentions therefore are without merit.

G. STANDARD 4 BRIEF

In his Standard 4 brief, defendant raises additional issues, filed pursuant to Supreme Court Administrative Order 2004-6, Standard 4, none of which warrant appellate relief.

1. RAPE-SHIELD STATUTE

Defendant argues that the trial court improperly excluded under the rape-shield statute evidence that IH allegedly molested another child in the household. Defendant argues that IH's testimony that he told her she would have to "follow through" related to her correcting her behavior after the incident with the other child, and that without disclosure of the incident, the jury was left with the impression that the statement was a threat by defendant to coerce sexual contact. We disagree. The rape-shield statute provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b through MCL 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j(1).]

The trial court correctly determined that evidence regarding IH's alleged molestation of another child did not fall within either exception to the rape-shield statute and was inadmissible under the rape-shield statute.

Defendant also argues for the first time on appeal that exclusion of this evidence interfered with his right of confrontation and to present a defense. Again, we disagree. "In certain limited situations, evidence that is not admissible under one of the statutory exceptions may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation." *People v Benton*, 294 Mich App 191, 197; 817 NW2d 599 (2011). Evidence of other sexual conduct may also be relevant to the complainant's motive for falsely accusing the defendant of criminal sexual conduct. *Id.*

In this case, however, defendant did not demonstrate that the circumstances warranted introduction of the evidence by making an offer of proof to the trial court to demonstrate the relevance of the evidence and justify its introduction. See MCL 750.520j(2); *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). Moreover, defendant was able to present a defense to the jury that he was the disciplinarian of the children and that IH was resentful because he disciplined her. IH testified that defendant was the person who enforced the rules, that she did not like it when he punished her, that she did not want him to be part of the household, and that she disclosed the sexual assault, at least in part, so that defendant would not come home. Because defendant was able to present his defense to the jury, the exclusion of additional supporting evidence did not infringe upon his right to present a defense. See *People v Propp*, 330 Mich App 151, 166-168; 946 NW2d 786 (2019). We similarly reject defendant's contention that defense counsel was ineffective for failing to timely raise these evidentiary challenges.

2. EVIDENCE OF PRIOR ACT

Defendant next contends that evidence that he accidently brushed up against IH while sleeping in the same bed was improperly admitted under MCL 768.27a. Because defense counsel did not oppose the prosecution's motion to admit this evidence and, in fact, agreed to the admission of the evidence, this challenge is unpreserved. See *Thorpe*, 504 Mich at 252. As discussed, in a prosecution charging a "listed offense" against a minor, MCL 768.27a governs the admissibility of evidence that the defendant committed other listed offenses against a minor. The incident that occurred while defendant and IH were in bed falls within the scope of this provision. MCL 768.27a; *Watkins*, 491 Mich at 472. We also disagree that exclusion under MRE 403 was indisputably required. Consequently, defendant has not established a plain or obvious error. Because the trial court's admission of the evidence was not improper, we also reject defendant's contention that defense counsel was ineffective by failing to challenge the admission of the evidence. See *Head*, 323 Mich App at 539.

3. BUTLER'S TESTIMONY

Defendant contends that during police interrogation, he asserted his right to remain silent, but several days later he was interrogated by CPS investigator Steffany Butler, without counsel and without being again advised of his *Miranda*[4] rights. Defendant contends that Butler interrogated him in violation of his Fifth Amendment rights, that Butler's testimony was introduced as improper rebuttal evidence, and that the prosecution improperly argued to the jury that his post-arrest, post-*Miranda* silence was an indication of guilt. We disagree.

Before a suspect may be subjected to custodial interrogation, he or she must be advised of his or her *Miranda* rights. *People v Daoud*, 462 Mich 621, 624 n 1; 614 NW2d 152 (2000). If during a custodial interrogation the interviewee states that he wishes to remain silent, the interrogation must stop. *People v White*, 493 Mich 187, 194; 828 NW2d 329 (2013). This limitation on custodial interrogation extends to questioning initiated by someone other than a police officer if that person is acting in concert with or at the request of the police. *People v Anderson*, 209 Mich App 527, 533; 531 NW2d 780 (1995). However, this Court has held that CPS caseworkers are not required to inform a defendant of *Miranda* rights despite their status as state employees because CPS caseworkers are not charged with enforcing criminal laws and do not act at the behest of the police. *People v Porterfield*, 166 Mich App 562, 566-567; 420 NW2d 853 (1988).[5] Moreover, the record in this case does not support defendant's argument that Butler's testimony was improper rebuttal evidence. We similarly disagree with defendant's characterization of the prosecution's argument; the prosecution's argument did not focus on defendant's silence, but rather upon discrepancies in the various statements defendant voluntarily made to police, to Butler, and to the jury.

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[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] An opinion issued by this Court before November 1, 1990, is not binding, but may be given deference as nonbinding precedent. *People v Spaulding*, 332 Mich App 638, 657 n 5; 957 NW2d 843 (2020).

4. VAGUE CHARGES AND ACQUITTED CONDUCT

Defendant next argues that he was denied due process because the charges were vague regarding the time of the alleged offenses, and that evidence was introduced related to a dismissed charge. Defendant did not preserve this issue for appellate review by raising it below. See *Thorpe*, 504 Mich at 252. In any event, we disagree that the charges were impermissibly vague. The prosecution's charge of a crime must give a defendant fair notice of the charge. *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009). Here, the information included the "time of the offense as near as may be" and any variance regarding the time was not fatal to the charges. See *Dobek*, 274 Mich App at 82-83.

Defendant also argues that because one of the charges was dismissed, all evidence regarding that charge should have been quashed and the jury should have been appropriately instructed. The trial court granted a directed verdict regarding Count 6 because there was no evidence related to that allegation. Defendant does not identify specific evidence that should have been stricken or instructions that should have been given, however. We also reject defendant's challenge that the prosecution's closing argument essentially treated the charges as interchangeable. The prosecution's argument focused on the relative credibility of the witnesses and circumstantial corroborating evidence regarding the remaining five charges. Because defendant's argument lacks merit, defense counsel was not ineffective for failing to raise it. See *Head*, 323 Mich App at 539.

5. MEDICAL RECORDS

Defendant argues that neither the prosecution nor defense counsel exercised due diligence to secure the examining physician as a witness, resulting in certain medical information being admitted into evidence without the opportunity for defendant to confront the examining physician. This issue is raised for the first time on appeal and therefore is unpreserved. See *Thorpe*, 504 Mich at 252. "The Confrontation Clause of the Sixth Amendment bars the admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Caddell*, 332 Mich App 27, 66; 955 NW2d 488 (2020) (quotation marks and citation omitted). In addition, "[t]he prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." MCL 767.40a(5). Here, there is no indication that defendant requested assistance locating or serving the examining physician,[6] or that the prosecution failed in this respect, nor has defendant overcome the presumption that defense counsel provided effective assistance. See *Head*, 323 Mich App at 539.

[6] We also reject defendant's challenges to the relevance and reliability of Ojala's testimony. Defendant misconstrues the purpose of Ojala's testimony, which was to explain why the absence of physical findings could be consistent with IH's allegations; defendant's challenges raise questions regarding credibility, but do not render her testimony inadmissible. See *Smith*, ___ Mich App at ___; slip op at 4.

6. JURY SELECTION

Defendant also raises several unpreserved challenges to the jury selection process. Defendant's contention that he was denied the right to be tried by a fair cross section of the community because the trial court dismissed prospective jurors based on their education level is without merit, and is premised on a misunderstanding of the principles underlying fair-cross-section challenges, which focus on whether a distinct group is underrepresented in the jury venire. See *People v Bryant*, 491 Mich 575, 596-597; 822 NW2d 124 (2012). Moreover, there is no indication that the prospective jurors were either selected or dismissed based upon education level; the trial court dismissed some prospective jurors who were students, apparently out of concern for their ability to participate given their academic schedules. We also find no record support for defendant's contention that the questioning of prospective jurors was deficient or that biased jurors were allowed on the jury. We presume that jurors are competent and impartial, and the party alleging grounds for disqualification bears the burden of proof. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). Here, defendant has not established grounds for juror disqualification, and we also find no support for defendant's contention that defense counsel was ineffective during voir dire.

7. JUROR MISCONDUCT

Defendant challenges the trial court's resolution of a report that Juror 3 spoke with the court bailiff regarding whether she would be permitted to submit questions to defendant. The bailiff reported the conversation to the trial court; the court instructed the juror that she could ask defendant questions only if he chose to testify and cautioned her to submit all questions in writing. Juror 3 agreed, and defense counsel agreed that the issue was adequately resolved, thereby waiving review of this issue on appeal. See *People v Kowalski*, 489 Mich 488, 503; 803 NW 200 (2011). We reject defendant's contention that defense counsel was obligated to challenge the trial court's resolution of this matter. There is no indication that any juror was exposed to extraneous information; defense counsel had no obligation to raise futile or meritless objections. See *Head*, 323 Mich App at 539.

8. JURY INSTRUCTIONS

Defendant contends that the jury instructions were inadequate. Defendant did not preserve this issue for review by making a specific objection or requesting an omitted instruction below. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant's contention that the jury instructions did not include instructions for all counts of the complaint is contradicted by the record. Defendant's contention that an instruction was required because the prosecution failed to produce the examining physician is not supported by the record. See *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). Defendant's contention that he was entitled to an instruction about the time, day, or period of the charged offenses also lacks support. See *Dobek*, 274 Mich App at 84. Contrary to defendant's argument that the jury should have been instructed that IH had prior inconsistent statements, the record indicates that the jury was properly instructed regarding her testimony. We also conclude that counsel was not ineffective for failing to raise meritless challenges. See *Head*, 323 Mich App at 539.

9. PROSECUTORIAL ERROR

Defendant also contends that he was denied a fair trial by several instances of prosecutorial error. Defendant did not raise these challenges below nor request curative instructions, leaving the challenges unpreserved. *People v Solloway*, 316 Mich App 174, 201; 891 NW2d 255 (2016). Defendant contends without basis in the record that the prosecution withheld material evidence, accused him of attempted possession of child sexually abusive material, failed to establish that defendant was the person who performed the internet searches, improperly impeached him with hypotheticals, made a civic duty argument and sought the sympathy of the jury during closing argument, asserted a personal belief that defendant was lying, relied on unrelated references regarding defendant's character, and argued facts not in evidence. Our review of the record does not demonstrate plain error arising from the prosecutor's conduct. Rather, defendant mischaracterizes many of the prosecution's statements; defendant's arguments fail to account for conflicting evidence and fail to recognize that a prosecutor is free to make arguments about inferences arising from the evidence.

10. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several additional claims of ineffective assistance of counsel in his Standard 4 brief. These claims are unpreserved because defendant raises them for the first time on appeal, thereby limiting our review to errors apparent on the record. Our review of the existing record reveals no apparent errors that warrant a finding of ineffective assistance of counsel.

Affirmed.

/s/ Michael F. Gadola
/s/ Kathleen Jansen
/s/ Colleen A. O'Brien