STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB JOHN MURPHY,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

Nos. 351627; 352683
St. Clair Circuit Court
LC No. 19-001015-FH

Before: M. J. KELLY, P.J., and STEPHENS and REDFORD, JJ.

PER CURIAM.

Defendant was charged with sexual misconduct involving two teenage girls. Although the offenses were charged together, they were tried separately before two different juries. In the first case, 351627, defendant was charged with second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*i*) (sexual contact with a victim between the ages of 13 and 16, and a member of the same household), accosting a child for immoral purposes, MCL 750.145a, and two counts of indecent exposure, MCL 750.335a. The trial court dismissed one count of indecent exposure and the jury found defendant not guilty of the remaining indecent exposure and guilty of accosting a child for immoral purposes. The trial court sentenced defendant to 12 months in jail for that offense and defendant appeals that conviction as of right.

In docket no. 352683, defendant was charged with third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(d) (sexual penetration of a person related by blood or affinity to the third degree), four counts of CSC-II, MCL 750.520c(1)(b)(*ii*) (sexual contact with a person between the ages of 13 and 16 who is related by blood or affinity to the fourth degree), and accosting a child for immoral purposes. The jury convicted defendant of CSC-III, three counts of CSC-II, and accosting a child for immoral purposes, but acquitted him of the fourth count of CSC-II. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to prison terms of 120 to 270 months each for the CSC-II and CSC-III convictions, and 48 to 72 months for the accosting a minor conviction, to be served concurrently. Defendant appeals these latter convictions and sentences as of right in docket no. 352683.

We affirm all of defendant's convictions, but remand for resentencing in docket no. 352683.

I. BACKGROUND

The defendant's trial in 351627 lasted three days. There were several prosecution witnesses including victim RW, defendant's then live-in girlfriend, RW's mother, RW's grandmother, a family friend, and a detective. The direct testimony came from RW. RW testified that there were several occasions that defendant would touch her inappropriately when she was between the ages of 12 and 14. She provided testimony concerning the defendant soliciting her for a sexual relationship during that same time period. RW also described an incident in which defendant exposed himself to her while his penis was erect. The jury convicted defendant of accosting a child for immoral purposes, but found him not guilty of CSC-II and indecent exposure.

The trial in 352683 also lasted three days and was held less than a month after the first trial. Defendant was charged with four counts of CSC-II, one count of CSC-III, and accosting a child for immoral purposes. The victim in that case was, TM, who was defendant's younger half-sister. The charges in that case were not date specific. TM testified that there were four separate incidents when she was 14 or 15 years old, when defendant touched different parts of her body for sexual gratification, including one occasion when he digitally penetrated her vagina. She testified that the defendant touched her multiple times during certain incidents. As with the other trial, there were several other prosecution and defense witnesses. The jury convicted him of three counts of CSC-II, CSC-III, and accosting a child for immoral purposes, but found him not guilty of the fourth count of CSC-II.

II. DOCKET NO. 351627

In Docket No. 351627, defendant makes three claims of error. He argues prosecutorial misconduct and evidentiary error. He also alleges that the cumulative effect of individual errors deprived him of a fair trial. We reject all three arguments.

A. PROSECUTOR'S CONDUCT

Defendant argues that reversal is required because the prosecutor improperly argued facts not in evidence and improperly vouched for RW's credibility when she argued during closing argument that children do not lie about being sexually assaulted. Defendant concedes that these claims of misconduct were not preserved with an appropriate objection at trial. *People v Abraham,* 256 Mich App 265, 274; 662 NW2d 836 (2003). He further argues, however, that defense counsel was ineffective for not objecting to the prosecutor's remarks.

Review of an unpreserved claim of prosecutorial misconduct "is limited to whether plain error affecting substantial rights occurred." *Id.* This Court will not reverse if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction from the trial court. *People v Williams,* 265 Mich App 68, 70-71; 692 NW2d 722 (2005). Because defendant did not raise an ineffective-assistance claim in an appropriate motion in the trial court, and this Court denied defendant's motion to remand, our review of defendant's ineffective-assistance claim is limited to errors apparent from the record. *People v Matuszak,* 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must demonstrate that trial

counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Claims of prosecutorial misconduct are decided case by case and the challenged conduct must be viewed in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Prosecutors may not make a statement of fact that is unsupported by the evidence, but they are permitted to argue the evidence and reasonable inferences arising from the evidence in support of their theory of the case. *Id.* at 282; *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). It is improper for a prosecutor to express personal knowledge or a personal belief regarding the credibility of a witness, or to vouch for the credibility of a witness by implying some special knowledge about the witness's truthfulness. *Bahoda*, 448 Mich at 276; *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, a prosecutor may comment on a witness's credibility and argue from the evidence that a witness is credible. *Thomas*, 260 Mich App at 455.

Defendant argues that the prosecutor improperly vouched for RW's credibility and argued facts not supported by the evidence in the following emphasized portions of the prosecutor's closing argument:

> Now [RW] is your typical 15-year-old girl. Certainly she might test the waters. She might get in trouble here and there, but that doesn't necessarily make her a liar and I want you to consider that when you're going back there and you're going to deliberate and decide whether you find that she's truthful or not because she is 15 and we all did things as 15-year-olds that maybe we might not be proud of today and maybe we got in trouble from our parents, but when we got in trouble our parents or stepparents or anything like that what did we do? *Fifteen-year-olds don't quite have that wit about them that they're going to make up some crazy story just to get back at somebody for getting in trouble for something small*.
>
> *I want to remind you that the Defendant has kind of been implying all along in this trial that he was punishing her and that's maybe why* [*RW*] *is making things up, but if you're going to make something up why are you making something up such as this? And why aren't you making it up against your mother who also is discipling you in that home? It just doesn't quite make sense.* [Emphasis added.]

Defendant also challenges the following remarks in the prosecutor's rebuttal argument:

> So honestly, all of the contentions that were made up here when Mr. Livesay was arguing to you just do not make sense. Kids don't make up stuff like this.

> They don't make up stuff like this and keep it straight and come and talk about penises in front of 13 strangers that they've never met before when they're embarrassed to talk about anything of that nature at that age. And I would suggest she's telling you the truth. And she's asking you to believe her and by believing her you'll return a verdict of guilty on all of these counts.

We first reject the assertion that the prosecutor argued facts not in evidence. We are reminded that jurors may use their own common sense and experience in the affairs of life as they analyze evidence. See CJI2d 3.5(9) and CJI2d 2.6(2). The argument regarding behavior that is typical of a 15 year old invites nothing more than use of common experience. The balance of the highlighted argument did not address facts, at all.

The prosecutor's comments were also responsive to the defense theory of the case which was that RW was not credible. Indeed , defense counsel remarked, "[RW] has told so many stories I may get this wrong." He further commented on RW's motivation to lie and the prosecutor's argument that RW was not likely to have made up the allegations by arguing as follows:

> Then we go to the allegation of the butt touching. The second degree criminal sexual conduct. I submit, ladies and gentlemen, what [RW] said happened never happened. The Prosecutor talked about [RW] if she were upset at [defendant], didn't like the rules, et cetera, why would she make, make up especially this kind of story. Now, maybe when I grew up that might have made sense. Why would they make up this kind of story. Not in this day and age, ladies and gentlemen. This is a different world. The stuff that you hear and see on television all the time about allegations of sexual misconduct because it does exist I'm not telling you that it doesn't exist. It certainly is something that, I submit, that some 15-year-old if I want him out of the house I know how to get him out of the house.

The prosecutor's remarks, in both her closing and rebuttal arguments, were responsive to the defense's claims that RW was likely to fabricate the allegations as part of a plan to get defendant out of the house. Considering the responsive nature of the remarks, they were not plainly improper. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977) (holding that remarks by a prosecutor were proper where they were responsive to matters raised by the defense).

Furthermore, the prosecutor never suggested that she had personal knowledge that RW was telling the truth. *Meissner*, 294 Mich App at 456. When arguing that 15-year-olds are not likely to make up allegations about sexual abuse merely to get back at someone after getting into trouble, the prosecutor did not suggest that she had some specialized knowledge on this subject, but only asked the jurors to evaluate RW's testimony using their common sense and ordinary knowledge of 15-year-olds. It is not improper for a jury to consider their own common sense and everyday experience in evaluating evidence. *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991). Accordingly, the prosecutor's comments were not improper.

Defendant also argues that defense counsel was ineffective for not objecting to the prosecutor's remarks. However, because the remarks were not improper, counsel's failure to

object was not objectively unreasonable. Further, because any objection would have been futile, defendant was not prejudiced by counsel's failure to object.[1]

B. EVIDENCE OF DEFENDANT'S INCARCERATION

Defendant also argues that he was denied a fair trial because of repeated references to his incarceration for an unrelated matter involving his failure to pay child support. We find no merit to this issue.

As defendant concedes, there were no objections to the references to his incarceration at trial, leaving his claim of evidentiary error unpreserved. MRE 103(a)(1). An unpreserved claim of evidentiary error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also argues, however, that trial counsel was ineffective for not objecting to the challenged evidence. But because defendant did not raise an ineffective-assistance claim in an appropriate motion in the trial court and this Court denied his motion to remand, appellate review of the ineffective-assistance claim is limited to mistakes apparent from the record. *Matuszak*, 263 Mich App at 48.

Defendant argues that evidence that he was incarcerated for an unrelated child-support matter was inadmissible under MRE 404(b)(1)[2], and the prosecutor's repeated introduction of this evidence violated his right to due process and denied him a fair trial. Defendant also argues that the prosecutor failed to comply with MRE 404(b)(2), which requires the prosecution to provide pretrial notice of any evidence offered under MRE 404(b)(1). Contrary to what defendant argues, the record discloses that the prosecution did not intend nor did the prosecution move to admit this evidence under MRE 404(b) and rather, it was defense counsel who introduced this subject at trial and then repeatedly explored the issue during his cross-examination of witnesses.

The issue of defendant's incarceration was initially brought up by defense counsel in his opening statement. Counsel stated:

> There's a lot of I submit unrelated compilation of events over a period of four years. That [RW] didn't want to have that discipline or that direction. She didn't want anybody telling her what to do or telling her about friends that she could have over or couldn't have over. And after the incident in the basement sometime after that [RW] and her mom did leave and then, then [defendant] was gone from

[1] To the extent that defendant asks this Court to remand this matter for an evidentiary hearing regarding his claim that counsel was ineffective, we deny that request because this issue can be resolved on the existing record, and because defendant has not presented any offer of proof of facts to be developed on remand. *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995).

[2] MRE 404(b)(1) prohibits evidence of a defendant's "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith," but permits such evidence for other noncharacter purposes. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).

> the home and you're, you're going to hear that [defendant] was gone from the home for a period of time. He was in jail up in Sanilac County. Not for some crime, but because of support. He had another child that he was there on a nonsupport matter. And that wasn't just a matter of [RW] not wanting to be around [defendant], because she wasn't living with her mom either. When [defendant] was gone.

The period of the defendant's incarceration was a timeline reference for both the defense and prosecution. To the extent that prosecution witnesses referenced defendant's incarceration on direct examination, they did so only in the context of explaining a time line of events surrounding RW's report of defendant's conduct. There was no attempt to use this evidence for an improper character purpose, or to suggest that it supported defendant's guilt of the charged offenses. RW's mother mentioned that she left the home that she shared with defendant the day after RW reported the assault and solicitation. She and her children did not return until after defendant was in jail. The detective who interviewed the defendant indicated in his rebuttal testimony that the interview was held in the jail but was very clear that the detention was for child support. On the defense side, defendant himself addressed the time of his incarceration to challenge RW's version of events. During closing argument, defense counsel again referred to defendant's incarceration in the Sanilac County Jail, where he had been "for a couple of weeks on nonsupport matters."

To the extent that the evidence of defendant's incarceration for an unrelated child-support matter even implicates MRE 404(b)(1), the evidence did not affect defendant's substantial rights because there is no basis for concluding either (1) that the introduction of the evidence gave rise to any impermissible character-to-conduct inference, or (2) that the evidence was unfairly prejudicial. As noted, it was defense counsel who introduced this subject in his opening statement, and defense counsel repeatedly revisited this subject during his cross-examination of witnesses.

Implicit in the argument that defense counsel was ineffective for failing to object when the evidence of his incarceration was mentioned, is an argument that defense counsel was ineffective for being the first to introduce the subject in his opening statement. To establish ineffective assistance of counsel, defendant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced defendant that he was denied a fair trial. *Pickens*, 446 Mich at 338. Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Tommolino,* 187 Mich App at 17. To establish prejudice, defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *Johnson,* 451 Mich at 124.

In this case, there were strategic reasons for defense counsel's introduction and exploration of this subject. First, counsel may have realized that the subject of defendant's incarceration was likely to come up at trial because it was relevant to a time line of the events surrounding RW's allegations. Counsel's decision to introduce the evidence preemptively was a reasonable strategy to avoid the element of surprise and reduce the impact of this evidence. Second, counsel repeatedly clarified that the incarceration was for an unrelated support matter, which prevented the jury from inferring that the incarceration was related to RW's allegations, which could have undermined defendant's presumption of innocence. Third, although there was evidence that RW had run away in October, counsel clarified that defendant was already in jail before she ran away, which undermined any inference that she ran away because she felt that she needed to be protected from

defendant. Defendant has not overcome the presumption that counsel's decision to introduce and explore this issue was sound trial strategy.

Furthermore, considering the purpose of the evidence and the manner in which it was used, and that the jury acquitted defendant of two of the three charges that it considered, there is no reasonable probability that the introduction of this evidence affected the outcome of defendant's trial. Accordingly, defendant has not demonstrated that he was prejudiced by counsel's handling of this issue.

C. CUMULATIVE ERROR

Defendant also argues that to the extent that the foregoing claims of error do not individually support reversal of his conviction, their cumulative effect deprived him of a fair trial. Although a single error in a trial may not necessarily provide a basis for granting a new trial, it is possible that the cumulative effect of multiple minor errors may add up to error requiring reversal. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The test is whether the cumulative effect deprived the defendant of a fair and impartial trial. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990). In this case, however, we have determined that the prosecutor's comments were not improper, and that defendant was not prejudiced by the introduction of evidence of his incarceration for an unrelated matter. Accordingly, defendant has failed to establish that the cumulative effect of multiple errors deprived him of a fair trial. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

III. DOCKET NO. 352683

In Docket No. 352683, defendant challenges his convictions and sentences for the offenses involving his conduct against TM. Although we affirm defendant's convictions of CSC-III, three counts of CSC-II, and accosting a child for immoral purposes, we agree that defendant is entitled to resentencing on those convictions.

A. PROSECUTOR'S CONDUCT

Defendant argues that reversal is required because the prosecutor (1) improperly vouched for TM's credibility, and (2) improperly argued facts not in evidence when commenting on the credibility of the testimony of two defense witnesses. Only the latter claim of misconduct was preserved with an appropriate objection at trial. Claims of prosecutorial misconduct are decided case by case by reviewing the challenged conduct in context to determine whether the defendant was denied a fair trial. *Bahoda*, 448 Mich at 266-267; *McElhaney*, 215 Mich App at 283. We review defendant's unpreserved claim of misconduct to determine "whether plain error affecting substantial rights occurred." *Abraham*, 256 Mich App at 274. This Court will not reverse if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction from the trial court. *Williams*, 265 Mich App at 70-71.

1. VOUCHING FOR TM'S CREDIBILITY

During closing argument, the prosecutor initially discussed her theory that TM was a vulnerable victim, stating:

> When we first started this trial last Wednesday I told you that this case was about essentially the exploitation of a vulnerable victim and I want to explain to you after now that you're heard all of the evidence why I think that that's true.
>
> You had the opportunity to meet the victim in this case [TM] when she came in here to testify for you and she told you a little bit about herself before she got into her story about why we're all here. She told you that she's currently enrolled in high school, she takes quite a few classes including AP classes, English language arts, arts and then she's a very fond advocate of the band or the drumline is what she participates in all the time.
>
> Now she's someone that despite everything else going on in her life she seems to be doing pretty well in keeping it all together and doing well in school and I don't think that that's anything that's disputed here, but what's interesting about [TM] is when you take a look at her home life and what that does for her. Because you heard and you had the opportunity to meet from some of her family and I would have to describe her home life as nothing less than chaotic. You heard that she lives with her father or at the time of this offense lived with her father and had lived with her father for the majority of her life since birth. You heard that her stepmother, mother had moved in and within a short period of moving in ended up marrying her father. You heard that there are eight other siblings on her father's side who kind are in and out of that house fairly regularly. You heard that there's also some step siblings, her stepmother has some siblings who are kind of in and out of the picture as well. You also heard some testimony about why these people are in and out and where they're going and what they're doing such as running away or some people have been gone to jail, things of those [sic] nature. All of those things are happening in [TM's] life. So it's a really busy household and what might slip through the cracks is a girl who tends to take care of herself and go to school and get good grades and not have a whole lot of attention paid to her.

In her rebuttal closing argument, the prosecutor further stated:

> You met [TM]. She seems right off the surface like a pretty good girl. She's taking AP classes, she does band, she does drums. Those are her passions. She doesn't seem like she's some sort of attention seeker. That she's making this up to try and help her image in any way and, in fact, this case would do the absolute opposite of it. Who wants to go out in the public and say, you know what, my family's a little be [sic] incestuous. You know what my brother did to me? My brother who's related to me by blood. That doesn't have enough of an ick factor for the general public or for a teen girl that they would want to stay away from my brother who's touching me? There were other options in this house. If she's making this up why is she making it up about her own brother and talking about incest and telling 13 strangers in this room that her brother is touching her and touching her in her vagina? That makes absolutely no sense that this was the person that she would be picking or this is the story that she would be picking, but let's go into this a little bit further.

The prosecutor went on to argue that it did not make sense for TM to make up the allegations against defendant in order to move in with her mother after her father had said that the only way she would be able to leave was if he (her father) was found to be unfit. The prosecutor posited that if that was TM's plan, the most effective way would have been to accuse her father, not defendant, who rarely was at their house. The prosecutor also questioned whether TM understood how Child Protective Services or the Department of Human Services works.

Defendant has not shown that the prosecutor's comments were improper. The prosecutor urged the jury to draw upon its perception of TM's demeanor and consider the testimony regarding her background, which were matters in evidence, when evaluating the veracity of defendant's suggestion that TM fabricated the allegations in order to leave her father's house. The prosecutor did not suggest that she had personal knowledge of facts, unknown to the jury, that TM was telling the truth. *Meissner*, 294 Mich App at 456.

In addition, the prosecutor's rebuttal comments were responsive to defense counsel's arguments. *Duncan*, 402 Mich at 16. Defense counsel argued that none of the events described by TM actually happened, and that TM told different stories. Counsel argued that conflict with her father s prompted TM to concoct the allegations against defendant so that she could live with her mother. The prosecutor was entitled to respond to defense counsel's attacks on TM's credibility by asking the jury to use its common sense and its observation of her behavior at trial to evaluate the credibility of the defense claim that TM fabricated the allegations of sexual misconduct. *Duncan*, 402 Mich at 16; *Thomas*, 260 Mich App at 455. In sum, considering the responsive nature of the prosecutor's remarks, that the remarks were grounded in the evidence and the jury's observations of TM at trial, and that the prosecutor did not suggest that she had some special knowledge that TM was credible, there was no error.

Furthermore, because the prosecutor's remarks were not improper, defense counsel's failure to object was neither objectively unreasonable nor prejudicial. *Pickens*, 446 Mich at 338; *Johnson*, 451 Mich at 124. To the extent that defendant requests a remand to the trial court to develop a record on this issue, we reject his request because the issue can be resolved on the existing record and defendant has not otherwise shown that a remand is necessary. *McMillan*, 213 Mich App at 141-142.

2. ARGUING FACTS NOT IN EVIDENCE

Defendant also argues that the prosecutor improperly argued facts not in evidence when discussing the veracity of the testimony of two defense witnesses, Vickie Murphy and Tim Murphy. During closing argument, the prosecutor discussed how "ridiculous" it was that defendant's witnesses recalled that when they got together to comfort defendant about his son's illness, they recalled TM getting up from bed during the night and using the bathroom, described TM throwing down the telephone, and claimed that they overheard TM's telephone call with her father on another occasion. The prosecutor also questioned the veracity of Vickie's and Tim's trial testimony and remarked that they failed to mention material aspects of their trial testimony in prior interviews, resulting in the following exchange:

> *MS. MONZO [the prosecutor]*: But you know what really kind of threw me off for that is because these people were interviewed and testified before. Vickie

Murphy and Tim Murphy were interviewed by Detective Merritt and you know what they had a perfect opportunity to talk about how this could never have happened because, you know, [defendant] never actually came to our house and the time that he was there he was completely supervised. Neither one of them gave the story when they were interviewed by police. They testified.

MR. LIVESAY [defense counsel]: Your Honor, I'm going to object. I don't believe there's any testimony with respect to interviews with them as to what was said.

MS. MONZO: I asked them specifically on their cross-examination.

THE COURT: I'm going to leave it to the jury to decide what evidence there is or isn't on the record. Go ahead. This is argument.

Our review of the record at trial leads us to conclude that the prosecutor did indeed cross-examine both witnesses about their prior interviews and statements to law enforcement. When the prosecutor cross-examined Tim, he admitted that he talked to Detective Keith Merritt and said he thought he told Merritt about "this other stuff," in reference to information disclosed at trial, but said that he was very distraught and crying during the interview and could not remember everything he said.

Vickie was also asked about her prior statements:

Q. Okay. Ma'am, you then told Detective Merritt that after you told her father that he drug him out and told him he wasn't allowed to be in her room; is that correct?

A. Exactly and that's what I stated before.

Later, Vickie admitted that she testified at a prior hearing, but did not mention the same facts that she offered at trial regarding the weekend that defendant was released from jail:

Q. Now besides going to, being participating in the interviews with CPS you've also gone to Court in regards to the CPS hearing, correct?

A. Yes.

Q. And you testified there as well, correct?

A. Yes.

Q. Okay. And you did not tell them during that court hearing about what you've testified here today that, the weekend when [defendant] got out of jail, correct?

A. They didn't ask me.

Q. Right. So, you did, in fact, talk about that there was a weekend you just did not talk about the fact that [TM] was not at her—at that house, correct?

A. We couldn't talk about anything it was yes or no answers only. We weren't able to.

Thus, there was record evidence of some inconsistency between the pair's trial testimony and their interviews.

B. JURY INSTRUCTIONS

Defendant argues that reversal is required because, despite the jury having been given a general unanimity instruction, it was not instructed that it needed to unanimously agree on the specific acts supporting any convictions of CSC-II and accosting a child for immoral purposes. We disagree.

Defendant concedes that there was no request for a specific unanimity instruction, or any objection to the instructions as given. Therefore, his claim of instructional error is unpreserved and review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. Defendant further argues, however, that defense counsel was ineffective for not requesting a specific unanimity instruction. Because defendant did not raise this ineffective-assistance claim in an appropriate motion in the trial court and this Court denied his motion to remand, appellate review of the ineffective-assistance claim is limited to mistakes apparent from the record. *Matuszak*, 263 Mich App at 48.

According to TM's testimony at trial, there were four different days when defendant engaged in sexual activity with her, and on some of those days the activity involved multiple acts of sexual touching. Defendant acknowledges that the trial court gave a general unanimity instruction whereby it instructed the jury that

> [a] verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on the verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.

Defendant now argues, however, that his right to a unanimous verdict was violated because only four counts of CSC-II were charged, but evidence was presented that multiple acts of CSC-II were committed on four different dates, the court did not provide a jury instruction advising the jury that it was required to unanimously agree on the specific acts supporting each conviction, and it is impossible to know whether the jury unanimously agreed on the specific acts that formed the basis for each CSC-II conviction.

It is well-settled that a criminal defendant has a right to a unanimous verdict. Const 1963, art 6, § 7; MCR 6.410(B). Thus, a trial court has a duty to properly instruct the jury regarding the unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). A court can satisfy this duty by providing the jury with the general or model instruction on unanimity, *People v Chelmicki*, 305 Mich App 58, 67-68; 850 NW2d 612 (2014); M Crim JI 3.11(3), which is what

occurred in this case. "However, a specific unanimity instruction may be required in cases in which 'more than one act is presented as evidence of the *actus reus* of a single criminal offense' and each act is established through materially distinguishable evidence that would lead to juror confusion." *Id*. at 68. In *Cooks*, 446 Mich at 512-513, our Supreme Court explained:

> [W]e reach the conclusion that a specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice.

This case is similar to *Cooks*, in which the Court held that a specific unanimity instruction was not necessary where the evidence offered in support of multiple acts of sexual penetration was materially identical and the defendant did not present separate defenses or offer materially distinct evidence regarding any particular act. In that case, similar to the instant case, the defendant merely denied the existence of any inappropriate behavior and the sole task for the jury was to determine the credibility of the victim with respect to the pattern of alleged conduct. *Id*. at 528; see also *People v VanDorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993) (where the specific identification of acts of sexual penetration was not in dispute and the defendant's position was simply that no sexual assault was committed, failure to give a specific unanimity instruction in no way impeded the defense and did not deny the defendant a fair trial).

While it is apparent that there was some juror confusion regarding the bases for the different counts as evidenced by the jury's question to the trial court, the court resolved that confusion when responding to the jury's note.

> We received a question from the jury. The question reads "We want clarification on what Counts 2, 3, 4, and 5 are. Are they separate events or are they different elements of the same criminal sexual conduct? . . . If separate events, does it matter which count is which?"

The juror confusion and the discussion with counsel before the jury was returned to the courtroom for instruction was concerning the correlation of dates and counts, not unanimity. The following exchange illustrates the issue:

> *MR. LIVESAY*: So, if basically in one event that he - - someone is alleged to have touched, touched their butt and then shook hands and touched their butt again that's two different second degrees CSCs?
>
> *THE COURT*: I think it is
>
> *MR. LIVESAY*: Okay. I, I would, I would object to that, but I understand what the Court's saying.

The court addressed the jury and noted: "The testimony in this case has been, at least it is alleged by the people based upon testimony that they believe supports their position, that on some of those

dates there have been multiple acts of criminal conduct on the same date." Later, the court stated, "You don't necessarily have to tie it to a particular date or time so long as you find the evidence proves beyond a reasonable doubt that those crimes occurred." A better instruction might have been "Each verdict must be unanimous and must be tied to a particular act."

Notably, even at that time, defense counsel never requested a specific unanimity instruction. No bill of particulars was requested pretrial. Defendant did not offer separate defenses or materially distinct evidence regarding any of the alleged acts. Rather, the defense theory at trial was that none of the events described by TM actually happened, and the defense suggested that TM fabricated all of the allegations as part of a scheme to be able to live with her mother. Given the posture of the case, the principal task for the jury was to determine whether it believed TM's testimony or had reasonable doubt about the veracity of her allegations. Under these circumstances, failure to give a specific unanimity instruction does not qualify as plain error.

Furthermore, the record does not support defendant's claim that defense counsel was ineffective for not requesting a specific unanimity instruction. Given the posture of the case, where defendant did not offer materially distinct evidence in defense of any particular alleged acts, but rather generally denied that the events described by TM ever happened, it was not objectively unreasonable for counsel to forgo requesting a specific unanimity instruction. *Pickens*, 446 Mich at 336-337.

C. CUMULATIVE ERROR

Defendant also argues that to the extent that the foregoing claims of error do not individually support reversal of his convictions, their cumulative effect deprived him of a fair trial. We disagree.

Because defendant has failed to establish multiple errors, there can be no cumulative effect supporting reversal of his convictions. *Dobek*, 274 Mich App at 106.

D. RESENTENCING

Defendant argues that he is entitled to be resentenced because the trial court sentenced him on the basis of its erroneous belief that he was convicted on all counts as charged. We agree.

At sentencing, the trial court remarked as follows:

> I can't quarrel at all with the verdict of the jury. I heard the evidence and it was important to me in this case that the jury heard the facts of this case and that they were not distracted by other things that rose to the level in my opinion of some unfair prejudice. And because of that you received some very favorable rulings from this Court that don't happen in most cases, *but even with that the jury in this particular case saw clear to convict you as charged of all of the charges involving your half sister* [*TM*]. And you're going to be severely punished for those.
>
> Even though the guidelines do address multiple convictions or, or multiple forms of bad behavior or conduct they don't really address in detail multiple criminal sexual conduct convictions. They do to a point but not specifically and

> because of that the Court has a great deal of latitude or discretion to fashion a sentence that is not only consistent with the facts and circumstances of the conviction offenses, but also the Defendant and all of the circumstances that I'm aware of and that I have to take into consideration at the time of sentencing. [Emphasis added.]

Contrary to the trial court's statement, the jury acquitted defendant of one of the charged counts of CSC-II. The trial court sentenced defendant within the sentencing guidelines range for his CSC-III conviction, but also imposed the same sentences for defendant's CSC-II convictions that it did for the CSC-III sentence. The court explained its sentencing decisions, in part, by commenting on the number of criminal sexual conduct acts committed by defendant.

It is well-settled that a defendant is entitled to be sentenced on the basis of accurate information. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006). "[A] sentence is invalid if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Although the trial court sentenced defendant within the sentencing guidelines range for CSC-III, given its statement that the jury had convicted defendant on all counts as charged, and its emphasis on the number of convictions, defendant is entitled to resentencing. The trial court's belief that defendant had been convicted of all charges was inaccurate, and its reliance on the number of acts of criminal sexual conduct committed by defendant to justify its sentencing decisions indicates that the inaccuracy might have affected defendant's sentences. Moreover, any consideration of the count for which defendant was acquitted would have also violated *People v Beck*, 504 Mich 605, 609; 939 NW2d 213 (2019), in which our Supreme Court held that due process prohibits a court from finding by a preponderance of the evidence that the defendant engaged in conduct for which he was acquitted and basing a sentence on that finding. Accordingly, we remand for resentencing in Docket No. 352683.

In Docket No. 351627, we affirm defendant's conviction. In Docket No. 352683, we affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Cynthia Diane Stephens
/s/ James Robert Redford