STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON MAX KING,

Defendant-Appellant.

UNPUBLISHED
October 14, 2021

No. 352264
Berrien Circuit Court
LC No. 2017-001863-FC

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Defendant, Jason King, appeals by right his jury convictions of two counts of criminal sexual conduct in the first degree (CSC-I), MCL 750.520b; six counts of criminal sexual conduct in the second degree (CSC-II), MCL 750.520c; two counts of criminal sexual conduct in the third degree (CSC-III), MCL 750.520d; and accosting a minor for an immoral purpose, MCL 750.145a. The trial court sentenced King to imprisonment of 135 months to 50 years for each of his CSC-I convictions, 57 months to 15 years for each of his CSC-II and CSC-III convictions, and 67 days for his accosting a minor conviction. On appeal, King argues that the prosecutor deprived him of a fair trial by making improper arguments and that the trial court erred when it allowed inadmissible hearsay testimony. He also argues that the applicable statute of limitations barred his accosting a minor conviction. We vacate King's accosting a minor conviction, but affirm in all other respects.

I. BACKGROUND

King was RK's stepfather and FH's biological father.[1] King had an on-again, off-again relationship with Kelly Mielke, the mother of RK and FH. King began dating Mielke when RK

[1] RK was born in 1994; FH was born in 1996.

was approximately one year old. King and Mielke had two separations before they married in 2002; during the second separation RK lived with Mielke and FH lived with King.

In 2009, King, Mielke, RK, and FH lived in a house on California Road in Bridgman, Michigan (the California house). They moved to a house on Red Arrow Highway (the Red Arrow house) in 2010. During the time when they stayed at the Red Arrow house, RK had a dating relationship with another teenaged girl from her high school, TH.[2]

At the end of the 2009-2010 school year, RK revealed to a friend that King was sexually abusing her; the friend apparently disclosed the abuse sometime over the summer break because police officers arrived to question RK later in the summer. Children's Protective Services and the Michigan State Police investigated RK's allegations in 2010 and early 2011. A forensic interviewer from the Berrien County Children's Advocacy Center interviewed RK and FH at that time. The prosecutor declined to bring charges, in part, because of RK's demeanor. Additionally, the family court refused to take jurisdiction over the children after reviewing the evidence. Mielke and King sent RK to live with King's mother; RK never returned to King's home.

After school resumed in 2010, TH revealed to a school counselor that, over the summer, King had touched her inappropriately. The Michigan State Police investigated TH's allegation, but closed the investigation without charging defendant with any offenses.

King and Mielke separated again in 2011 and divorced in 2012. FH lived with King after her parents' separation. King and FH moved out of the Red Arrow house in 2012 and lived with King's girlfriend until they separated in 2013; King and FH then moved to an apartment. FH graduated from high school in 2015. After FH started her second year of college in January 2017 she revealed to a family friend that King had been sexually abusing her since RK left the home.

The Michigan State Police investigated FH's allegations and reviewed the earlier allegations by RK and TH. The prosecutor eventually charged King with 11 counts involving the three victims. At trial, King testified that he did not have any sexual contact with any of the victims. He argued that the victims made up their stories for various reasons. The jury rejected King's arguments and found him guilty on all 11 counts. The trial court then sentenced King as explained earlier. This appeal followed.

II. ANALYSIS

A. PROSECUTORIAL MISCONDUCT

King first argues that the prosecutor improperly appealed to the jury's sense of civic duty and sympathy for the victims during her opening and closing remarks, and improperly argued facts not in evidence. King argues that these errors prejudiced his defense and warrant a new trial.

"To preserve a claim of prosecutorial misconduct, the defendant must make a timely and specific objection to the conduct at trial." *People v Clark*, 330 Mich App 392, 433; 948 NW2d

[2] TH was born in 1995.

604 (2019). King did not object to the prosecutor's remarks during the prosecutor's opening or closing statement. Defense counsel did object to the prosecutor's rebuttal closing argument after the prosecutor completed her remarks and the jury retired from the courtroom. Specifically, defense counsel noted that the prosecutor had "argued that Jason King knew he was being watched at the time these events happened." She then told the trial court that argument was unfair: "I don't think that's a fair argument to make after the Prosecutor's Office has declined charges and the Children's Protective Services case is closed, and we can't tell them that." Notably, defense counsel did not request any particular relief, and the trial court simply noted the objection for the record.

Defense counsel's objection after the jury left the courtroom was not sufficient to preserve the claims of prosecutorial misconduct. Defense counsel did not object on the ground that the prosecutor's remarks amounted to improper appeals to civic duty or sympathy for the victims. Thus, King's claims that the prosecutor committed misconduct by appealing to civic duty or sympathy for the victim are unpreserved. See *id*. Defense counsel also did not object to the prosecutor's argument that King knew he was being watched on the ground that there was no evidence to support that claim; she asserted that argument was improper because she was precluded from presenting evidence that the formal investigations into King had been closed. An objection on one ground is not adequate to preserve a claim of error on another ground. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Thus, this issue is also unpreserved.

Defense counsel also discussed these claims of error in her motion for a new trial. A motion for a new trial preserves a claim that the trial court abused its discretion when it denied the motion; it does not preserve a claim of error that had to be preserved by a contemporaneous objection at trial so as to give the trial court an opportunity to correct the error with a curative instruction. See *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). Consequently, King failed to preserve his claims that the prosecutor engaged in misconduct, but he preserved his claim that the trial court abused its discretion when it denied his motion for a new trial.

Unpreserved issues are reviewed for plain error. *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, 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 independent of the defendant's innocence. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks, citations, and brackets omitted).]

"A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.' " *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018).

This Court reviews for an abuse of discretion a trial court decision on a motion for a new trial. *People v Powell*, 303 Mich App 271, 276-277; 842 NW2d 538 (2013). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "A trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Abraham*, 256 Mich App at 272-273. A prosecutor may not inject issues broader than the defendant's guilt or innocence in his or her opening and closing remarks. *People v Bahoda*, 448 Mich 261, 284; 531 NW2d 659 (1995). Consequently, "a prosecutor may not urge the jurors to convict the defendant as part of their civic duty." *Abraham*, 256 Mich App at 273.

The prosecutor began her opening statement by informing the jury that "the system" failed the victims:

> Thank you. If someone hurts you or makes you feel uncomfortable, go tell an adult. That's what we tell children and teens. Tell a parent, tell a teacher, find a trusted friend. This message invites children and teens to act with the promise, spoken or not, that if they do reach out and they do tell[,] things will get better.
>
> Today and in the days that follow you will see that this message is nothing more than a hollow lie. It's a lie because in this case each victim did reach out and do what they were told and things did not get better. Each victim was failed.

The prosecutor suggested that the evidence would show that the abuse could have been avoided or minimized if the victims' claims had not been "swept under the rug." She stated that, after the initial disclosure, RK learned that she was on her own, and King learned that he was "bulletproof." After discussing what she believed the evidence would show about the abuse, the prosecutor invited the jurors to give the victims closure:

> These girls, now women, did their job time and time again by telling an adult what was happening. They did what they were told to do. They told someone, and yet they were failed time and time again. Please, don't let history repeat itself here. Don't let the Defendant's actions be swept under the rug again. Don't let another person stand here and say it could have ended there, but it didn't.
>
> End it here with this trial. Tell those victims that you hear them, that you believe them, and give them the closure and justice that they have been waiting years for and that they deserve. Tell the Defendant it ends now. Thank you.

The prosecutor informed the jury that the evidence would show that RK, FH, and TH were the victims of repeated sexual abuse by King and that they had been "failed time and time again." She insisted that the jury had to stop "history" from repeating itself by giving the victims the "closure and justice" they deserved. Stated another way, the prosecutor suggested that the jury

had an obligation to rectify the past failures to stop King by finding King guilty. She also suggested that, should the jury fail in this regard, there may be "another person" standing there at some point saying that it could have "ended there."

Before the next day of trial, the trial court admonished the prosecutor for her opening remarks:

> Again, you can argue the way you feel the evidence has been presented and interpreted, as long as they meet the rules, but in this one just be careful. Don't—you know, in your opening you were asking for their sympathy, not to let people get away with this, showing an example. Those are all the kind of catch words that the prosecutor overstepped their bounds by asking the jury to do their civic duty rather than just listen to the facts of the case and apply it. They have no obligation to stop child sexual predators across the board and use this case as an example, so let's just deal with the facts of this case, argue the facts of this case, and have them making rulings and decisions on the facts of this case and not the general problem of children reporting incidences nationwide.

Despite the trial court's warning, the prosecutor returned to this theme in her closing argument. She stated that they were at trial "because three women were brave enough to face their abuser." She noted that the victims had endured being treated like "trash" and that it was time to end this chapter in their lives:

> They hope that you will see that what they endured was very real. [RK] told in 2009 and 2010. [TH] told later in 2010. [FH] finally told in 2017. They all told because it was the right thing to do, not because anyone could promise them any certain outcome. These are three young women who have borne the burden of his abuse long enough and it's time that that burden sits where it belongs, on his shoulders. The only way to ensure that that happens is for you to tell him that this ends now.
>
> Please let this chapter of their lives close, those three young women, with justice by holding him accountable, by holding their abuser accountable. Thank you.

In her closing, defense counsel reviewed what she felt were inconsistencies and problems in the testimony of RK, TH, and FH, and argued that they were not worthy of belief. She maintained that the prosecutor's case came down to a "nebulous story" of abuse that "happened at a general time with details that are either unlikely or plain impossible."

The prosecutor responded by discussing the purported inconsistencies at length and explaining how the alleged motives to lie were simply not credible. The prosecutor argued that the evidence simply did not support a theory that the victims conspired to frame King: "If these girls really wanted to conspire against him, please tell me when that started. When? In 2009? In 2010? 2017? When and how did they all get together and decide this is what they were going to do?" Still, rather than ending on that note, the prosecutor decided to make yet another appeal to the jury:

> [King] wants to put the responsibility for this on anyone else's shoulders but his. All these three young women want is to be heard and know that this isn't going to happen anymore. We're here because they were abused, but I hope we can leave at the end of this trial with justice for them and the message to them that it was worth coming forward. Thank you.

Viewed as a whole, the prosecutor's opening and closing remarks included improper appeals for the jury to convict defendant, at least in part, out of civic duty and to have sympathy for the victims. See *Abraham*, 256 Mich App 265, 272-273. A prosecutor's improper argument does not, however, invariably warrant a new trial. Rather, this Court will reverse only if "a curative instruction could not have eliminated" the possible prejudice. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

The prosecutor made her first improper appeal in her opening statement before the presentation of the evidence, which lessened the force of her appeal to duty and sympathy. The improper portion was also limited to a few sentences at the end of a lengthy opening. Defense counsel had the opportunity to respond to the opening remarks, and she argued that there was a good reason why the claims did not proceed when first made: the accusers had a motive to "make up their allegations" and were not "telling the truth." She also suggested that the evidence would show that Mielke did not believe RK and that TH's mother, Heather Newmiller, did not believe TH. The crux of defense counsel's argument was that "the system" did not fail the victims at all because their allegations were false and they were not in fact victims.

On this record, the prosecutor's improper appeals to civic duty and sympathy do not warrant relief. The prosecutor's improper appeals were implied, rather than blatant. Additionally, had defense counsel objected, the trial court could have instructed the jury in a way that would have reemphasized that the prosecutor's remarks were not evidence and that the jury had to decide the case on the basis of the evidence. Indeed, when it denied King's motion for a new trial, the trial court stated the very same thing. The trial court noted that it had admonished the prosecutor to "tone back" the "justice needs to be served . . . whole thing" after the opening statements. It stated as well that, had defense counsel objected, it would have reminded the jurors that the prosecutor's statement was not evidence, which it determined would have cured any prejudice occasioned by the improper remarks. The trial court was correct. A timely instruction would have made the jury aware of the impropriety and would have reminded the jurors that their duty was to decide the case on the basis of the evidence, not from sympathy. The jury would presumably have followed such an instruction, and the instruction would have cured the prejudice. See *Abraham*, 256 Mich App at 279.

This case also did not involve a close credibility contest. There was testimony and evidence that RK revealed abuse in 2010. Her revelation in 2010 corresponded with her testimony at trial. There was also evidence that TH independently revealed abuse later that year and, although TH discussed additional incidents at trial, the details from the revelation in 2010 were consistent with her testimony at trial. FH also testified about being subjected to years of abuse after her sister left the home, which only ended with her revelation of the abuse in 2017. King responded by denying the allegations and suggesting that each victim had an independent motive to lie. The trial court also mitigated the prejudicial effect of the improper remarks when it instructed the jury that it had to decide the case on the evidence, the prosecutor's remarks were not evidence, and it should only

"accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Indeed, the trial court reiterated just before the prosecutor spoke that the lawyers' remarks were just their theories and not evidence. On this record, the weight of the testimony and evidence was such that any prejudice caused by the prosecutor's improper remarks could not have affected the outcome at trial. Thus, the prosecutor's improper appeals did not amount to plain outcome-determinative error. See *Carines*, 460 Mich at 763.

King also argues that the prosecutor improperly argued a fact that was not in evidence. "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

During her rebuttal closing argument, the prosecutor responded to the defense's argument that King would not have taken FH to see a counselor had he really been abusing children. She argued that King might have had a motive to bring FH to counseling to give the appearance of being beyond suspicion:

> He wants you to think because he took [FH] to see Gloria Gillespie that he couldn't possibly have been doing these things that the victims told you he was doing. Let's review. There was an investigation in 2010. We've heard about that, law enforcement and [Children's Protective Services]. He was being watched for sure. He had just gotten [FH] back in the home. Wouldn't it bring more suspicion on him if he said hell no, you're not going to see that woman anymore? You're not seeing anybody. Isn't that more suspicious?

The prosecutor's remark could be interpreted as a claim that the evidence showed that law enforcement and Children's Protective Services were watching King, but the context suggests that the argument was more general—namely, that people were aware that RK and TH had alleged sexual abuse and that King might have felt himself to be under scrutiny. For that reason, she argued, he might have believed that it was prudent to send FH to a counselor to maintain the appearance of propriety. The evidence that both RK and TH had alleged abuse and that school personnel, parents, police officers, and Children's Protective Services investigators were all involved at various points as a result was evidence from which the jury could infer that King might have felt that his actions were under scrutiny. As such, there was evidence from which the jury could find that King was actually being watched—whether by Mielke, school personnel, or others—or, at the very least, might have acted on the assumption that he was being watched. Accordingly, the prosecutor's argument did not amount to arguing a fact not in evidence.

Furthermore, even if interpreted literally and found to be improper, it does not appear that the prosecutor was deliberately trying to inject a fact not in evidence to prejudice the defense. Rather, the remark appeared to be an impromptu response to the defense argument. A timely objection would have allowed the trial court to instruct the jury that there was no evidence that the officers and Children's Protective Services continued to investigate King, and would have provided the prosecutor an opportunity to clarify her argument. Because an instruction would have cured any minimal prejudice, this claim of prosecutorial misconduct would not warrant relief. See *Abraham*, 256 Mich App at 279.

King has not identified any prosecutorial misconduct that rose to the level of plain outcome-determinative error. See *Carines*, 460 Mich at 763. Additionally, for the same reasons, the trial court did not err when it determined that a timely instruction could have cured the prejudice caused by the prosecutor's improper remarks. Consequently, the trial court did not abuse its discretion when it denied King's motion for a new trial premised on prosecutorial misconduct. See *Mahone*, 294 Mich App at 212.

B. HEARSAY

King next argues that the trial court erred when it allowed several witnesses to offer hearsay testimony and that defense counsel was ineffective to the extent that she did not object. To preserve an evidentiary claim for appellate review, King had to raise that particular issue in the trial court and raise the same basis for objection on appeal. *People v Gaines*, 306 Mich App 289, 306; 856 NW2d 222 (2014). As King concedes on appeal, defense counsel did not object to the potential hearsay statements of Newmiller and Amanda Schupbach. Thus, those evidentiary claims are unpreserved. Defense counsel did, however, object at trial to Detective Michael Sites's potential hearsay testimony. As such, King preserved his claim that the trial court erred when it allowed Detective Sites's potential hearsay testimony. See *id.*

When properly preserved, this Court "review[s] for an abuse of discretion a trial court's decision to admit or exclude evidence," and reviews any preliminary legal questions of law de novo. *People v Mann*, 288 Mich App 114, 117; 792 NW2d 53 (2010). Preliminary questions of law require a court to determine "whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Cameron*, 291 Mich App 599, 608; 806 NW2d 371 (2011) (quotation marks and citation omitted). Additionally, as discussed earlier, we review unpreserved issues for plain error. *Cain*, 498 Mich at 116.

Regardless of whether a claim of ineffective assistance is properly preserved, if the trial court did not hold a *Ginther*[3] hearing, "our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

"Under Michigan's evidentiary rules, hearsay is an unsworn, out-of-court statement that is offered in evidence to prove the truth of the matter asserted." *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013) (citations and quotation marks omitted). If a statement is offered "for a purpose other than to prove the truth of the matter asserted, then the statement, by definition, is not hearsay." *Id.* Hearsay does not include, however, a prior statement of a witness, if the witness testified at trial and was subject to cross-examination concerning the statement, and the statement

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). No *Ginther* hearing was held in this case.

was—in relevant part—consistent with the declarant's testimony and was "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." See MRE 801(d)(1)(B). Hearsay is inadmissible unless an exception applies. See MRE 802; MRE 803; MRE 803A; MRE 804.

At trial, the prosecutor recalled Detective Sites and asked him—over objection—whether RK had disclosed—when Detective Sites interviewed her in 2017—that King had sexually assaulted her on the couch. Detective Sites testified that he asked RK whether she had been assaulted anywhere other than in her bedroom, and RK responded, "yes, once on the couch."

The prosecutor recalled Detective Sites in part to rebut defense counsel's implied attack on RK's credibility. RK testified that King had touched her vagina and breasts in her bedroom for the most part, but that he also digitally penetrated her vagina on one occasion when she was sleeping on a couch. On cross-examination, defense counsel asked RK whether she had testified about the couch incident "at any hearing" before, and RK responded that she did not know whether she had. After a bench conference, the trial court stated that the parties agreed that RK did not testify about the couch incident at the preliminary examination. Defense counsel then asked whether she had reported the couch incident that took place at the home on Red Arrow to anyone else. RK corrected defense counsel's assertion that the incident occurred at the Red Arrow house by stating that it occurred at the California house, but she did not answer whether she had told anyone else.

Examining the record in context, defense counsel's questions implied that RK had only recently made up the allegation involving the sexual assault on the couch. Defense counsel asked RK whether she had "testified" about the incident before and the prosecutor conceded that RK had not testified about that incident at the preliminary examination, which was held in August 2017. Defense counsel also asked RK whether she had told anyone else about the couch incident, and, in doing so, she suggested that the answer would be no: defense counsel asked, "And you have never reported an incident involving your father while you were laying on a couch . . . have you?" The clear import of this line of questioning was that, if this incident were a real event, RK would have reported it earlier—at least by the time of the preliminary examination. Given this, there was an implied assertion that RK fabricated the claim since the preliminary examination. Consequently, because Detective Site's testimony was offered to rebut the implied charge of recent fabrication by showing that RK had made a statement that was consistent with her testimony, that statement was not hearsay by definition. See MRE 801(d)(1)(B).

King suggests that Detective Sites's testimony about RK's statement does not fall under MRE 801(d)(1)(B) because RK had a motive to lie about King sexually assaulting her long before she made the statement to Detective Sites. The proponent of a statement offered consistent with MRE 801(d)(1)(B) must establish four elements:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed

> motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (quotation marks and citation omitted).]

Accordingly, in this case, the relevant inquiry is whether the consistent statement was made before the point at which the defense implied that RK fabricated the new statement. The defense implied that RK had fabricated the new allegation since the preliminary examination and Detective Sites testified that RK made a consistent statement before the preliminary examination. Thus, Detective Sites's testimony about what RK told him was admissible as a nonhearsay statement under MRE 801(d)(1)(B). See *Jones*, 240 Mich App 707.[4]

King also argues that the trial court plainly erred when it allowed Newmiller to offer hearsay testimony about a statement made by TH, and similarly erred when it allowed Schupbach to offer hearsay testimony about a statement made by FH.

Newmiller testified that she was TH's mother and that the school counselor called her at work and asked her to report to the school, which she did. After Newmiller described what she saw when she arrived at the school, the prosecutor asked: "And at that point did you get filled in on why you had come?" Newmiller responded with a narrative about her meeting. She explained that TH told her: "while I was staying over at the King's house, [King] asked me to go outside and he touched me on my thigh, and then he proceeded to put his hands down her pants."

The prosecutor did not explicitly ask Newmiller to relate what TH had said at the meeting. Rather, the prosecutor asked whether Newmiller understood the occasion for the meeting, which was relevant to assessing her subsequent actions. As such, Newmiller's answer was unresponsive. As this Court has explained, "unresponsive answers may work a certain amount of mischief with the jury, but they are generally not considered prejudicial errors unless egregious or not amenable to a curative instruction." *Mahone*, 294 Mich App at 213 (quotation marks and citations omitted). If defense counsel had objected, then the trial court could have provided an instruction that would have cured the minimal prejudice occasioned by Newmiller's unresponsive testimony. See *id*. Indeed, as the prosecutor aptly notes, Newmiller's recollection of TH's statement conflicted with TH's trial testimony about the assault in a way that favored the defense by suggesting that TH could not keep her story straight. Accordingly, any error in the admission of Newmiller's statement about what TH told her at the meeting did not prejudice the defense and did not amount to plain outcome-determinative error. See *Carines*, 460 Mich at 763.

The prosecutor similarly questioned Schupbach about the circumstances under which FH revealed some information to her. Schupbach testified that FH came to her about something in early 2017. The prosecutor then asked: "And you don't have to tell us everything she said, but what was the—what was the information concerning?" Schupbach answered that FH told her that

[4] We note that Detective Sites's testimony about RK's statement would also be admissible for non-substantive purposes if it was not offered to prove the truth of the matter asserted because it would show that RK told someone years before trial about the incident on the couch. See *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); MRE 401.

King had been sexually abusing her. She also testified that FH said that RK had not been lying and that she knew that to be true because King had been doing the same thing to her.

The prosecutor framed her questions to ask about the nature and amount of information that FH provided to Schupbach, but Schupbach responded with testimony about FH's statements. Nevertheless, the prosecutor's questions arguably invited Schupbach to testify about FH's statements. Schupbach's testimony that FH told her that King was sexually abusing her and that FH knew that RK was telling the truth for that reason were inadmissible to the extent that it was offered to prove the truth of those matters. See MRE 801(c); MRE 802. Nevertheless, contrary to King's assertion on appeal, Schupbach's hearsay testimony was not particularly prejudicial. This case was not a credibility contest solely between FH and King; rather, this case involved three victims who each independently reported abuse to third parties over a span of years.

Moreover, the defense theory of the case depended on the contention that FH fabricated her claims or made her claims in part on the basis of influences from Schupbach. For that reason, the evidence that FH disclosed allegations to Schupbach—although prejudicial in some sense—was also helpful to the defense. Indeed, defense counsel cross-examined Schupbach about FH's disclosure and elicited similar testimony. Defense counsel's cross-examination suggested that Schupbach played a role in causing FH to adopt a narrative that FH later repeated to police officers. And defense counsel actually argued that theory in her closing statement: she argued that FH looked up to Schupbach as a woman who survived sexual abuse and adopted Schupbach's narrative, "just like all of the other things that she emulates." Given that the defense elicited similar testimony from Schupbach and used her testimony to the advantage of the defense, it cannot be said that the trial court's failure to sua sponte bar Schupbach from testifying affected the outcome of the case. Thus, it was not plain outcome-determinative error. See *Carines*, 460 Mich at 763.

King has also not demonstrated that defense counsel provided ineffective assistance by failing to object to the hearsay testimony of Schupbach and Newmiller. A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. [*People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (citations omitted).]

The "reasonable probability" standard can be satisfied by less than a preponderance of the evidence. *People v Trakhtenberg*, 493 Mich 38, 56; 826 NW2d 136 (2012).

The "reviewing court must not evaluate counsel's decisions with the benefit of hindsight," but should "ensure that counsel's actions provided the defendant with the modicum of representation" constitutionally required. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks

may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defense counsel may decide, for example, "not to object to an obvious error" for "strategic reasons." *Randolph*, 502 Mich at 12. Thus, there is a "strong presumption that trial counsel's performance was strategic," and "[w]e will not substitute our judgment for that of counsel on matters of trial strategy." *Unger*, 278 Mich App at 242-243.

As noted, the record showed that defense counsel used Schupbach's testimony about the information that FH shared with her to support the defense theory of the case. Thus, the record actually demonstrates that defense counsel had a sound reason for allowing Schupbach's testimony. Similarly, defense counsel may have felt that Newmiller's testimony benefited the defense because her recollection of TH's statement undermined TH's trial testimony. Defense counsel may also have wished to refrain from drawing the jury's attention to the comments. See *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Because this Court can conceive of legitimate strategic reasons why defense counsel may have chosen not to object, we cannot conclude that defense counsel's failure to do so fell below an objective standard of reasonableness under prevailing professional norms. See *Clark*, 330 Mich App at 427. Additionally, any prejudice arising from the testimony was minor. Thus, it cannot be said that, but for defense counsel's failure to object, there was a reasonable probability that the outcome would have been different. See *Lockett*, 295 Mich App at 187.

C. STATUTE OF LIMITATIONS

Finally, King argues that it was plain error to allow his conviction of accosting a minor because that charge was time-barred under the applicable period of limitations. In the alternative, he also argues that defense counsel was ineffective for failing to raise that defense in the trial court.

A defendant must raise a statute of limitations defense at the trial court level; if he does not, then the issue is waived. *People v Everard*, 225 Mich App 455, 461-462; 571 NW2d 536 (1997). See also *People v Burns*, 250 Mich App 436, 439-440; 647 NW2d 515 (2002). Defendant failed to raise his statute of limitations defense at the trial court level. Thus, the issue is waived. See *Everard*, 225 Mich App at 461-462. King's direct claim of error, therefore, must fail. But King also argues that his trial counsel was ineffective for failing to raise the statute of limitations defense. King has not waived that issue and, therefore, we address it here.

An indictment for accosting a minor must be found and filed within six years after the offense was committed. MCL 767.24(10).[5] At trial, TH testified that the accosting incidents all occurred in summer 2010, but King was not indicted for that offense until 2017. Because more than six years had passed, the charge of accosting a minor was time-barred. See *id.*

A competent defense attorney would have discovered that TH's accusations involved events that occurred more than six years before King's indictment. Moreover, we cannot conceive of a legitimate strategic reason for defense counsel to refrain from asserting the defense given the

[5] Because the amendments since King committed the offense are not relevant to the resolution of this claim of error, see *People v Kasben*, 324 Mich App 1, 8-11; 919 NW2d 463 (2018), we have cited the current statute.

circumstances. See *Unger*, 278 Mich App at 242-243. Indeed, the prosecution concedes in its brief on appeal that "there is no record evidence to suggest that defense counsel's failure to raise this issue was a matter of trial strategy." Thus, defense counsel's failure to raise the defense in the trial court fell below an objective standard of reasonableness under prevailing professional norms. See *Lockett*, 295 Mich App at 187. The failure also plainly prejudiced King because the trial court would have had to direct a verdict in King's favor on that charge had defense counsel raised the defense. See *id.*

The remedy for ineffective assistance of counsel must be tailored to the circumstances of the particular case. *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). Normally, the remedy for ineffective assistance at trial is to order retrial. *People v Gridiron (On Rehearing)*, 190 Mich App 366, 370; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). But, when the defendant was entitled to a verdict in his favor, we vacate the conviction and prohibit retrial. *Id.* Consequently, we vacate King's accosting a minor conviction and prohibit retrial on that count because the statute of limitations bars the conviction.

III. CONCLUSION

King has not identified any errors that warrant a new trial or resentencing on his first 10 convictions. Thus, we affirm those convictions and sentences. King has shown that defense counsel provided ineffective assistance by failing to assert the statute of limitations as a bar to his accosting a minor conviction. Accordingly, we vacate the accosting a minor conviction and prohibit retrial of that charge. Affirmed in part and vacated in part.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/Michael F. Gadola