STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEFFON LOREN FLOYD,

Defendant-Appellant.

UNPUBLISHED
June 24, 2021

No. 352875
Wayne Circuit Court
LC No. 19-003013-01-FC

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a), and indecent exposure, MCL 750.335a. The trial court sentenced defendant to concurrent terms of 40 to 70 years' imprisonment for the CSC-I conviction, 10 to 15 years' imprisonment for the CSC-II conviction, and 273 days in jail, time served, for the indecent exposure conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The 28-year-old defendant was convicted of sexually assaulting EP, the youngest daughter of his former live-in girlfriend, DR, and exposing himself to EP in their family residence in Detroit. The prosecution presented evidence that for several years, defendant and DR lived together with DR's four daughters, EP, ZS, IS, and DL. The four sisters testified at trial about defendant's inappropriate conduct toward them over several years. The sexual assaults were ultimately disclosed to the police and Child Protective Services (CPS) after ZS shared with a friend through social media that defendant had digitally penetrated her.[1] The friend's mother saw the exchange and contacted CPS and the police. Defendant was charged with a total of 16 counts relating to

[1] There was testimony at trial that DR was apprised of the sexual abuse of her daughters before this CPS investigation, but she failed to take appropriate action to protect her children. DR pleaded guilty to three counts of fourth-degree child abuse and was sentenced to five years' probation.

three of the sisters—EP, ZS, and IS, but the jury convicted defendant of only three counts, all involving EP. At trial, the defense denied that defendant sexually abused any of the girls.

II. *BRADY* VIOLATION

Defendant first alleges that the prosecution violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by withholding critical impeachment evidence that DR had witnessed defendant in her daughters' bedroom where he claimed to be looking for something and, on another occasion, she saw ZS wake up crying and complaining that defendant had touched her. We disagree.

Because defendant failed to argue at trial that the prosecutor committed a *Brady* violation by not disclosing this evidence before trial, this claim is unpreserved. Accordingly, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a due-process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady*, 373 US at 87. To establish such a due-process violation, a defendant must prove the following: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v Chenault*, 495 Mich 142, 155; 845 NW2d 731 (2014). "Evidence is favorable to the defense when it is either exculpatory or impeaching." *Id.* at 150. "To establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted.)

Preliminarily, defendant cannot complain that the evidence at issue was suppressed because he had actual knowledge of the evidence at trial. The gravamen of a *Brady* violation is the prosecution's failure to disclose favorable evidence within its control unknown to the defense. *Chenault*, 495 Mich at 153. To the extent that defendant's complaint actually concerns a delayed disclosure of evidence, not a total deprivation of that evidence, defendant's *Brady* claim fails because he has not shown that the evidence was *favorable* or material. DR's testimony that she saw defendant in her daughters' bedroom, supposedly looking for something, and that ZS woke up crying and complaining that defendant had touched her, was not favorable. Although defendant emphasizes that DR denied in her two police statements that she witnessed any sexual abuse, her challenged trial testimony is wholly consistent with her statements that she did not actually witness any sexual abuse. Defendant's claim that these belatedly revealed incidents could have somehow been used to support a defense theory that ZS was merely dreaming that defendant had touched her, and could have undermined the credibility of EP's allegations, is speculative at best, particularly considering that each of the daughters testified about their own interactions with defendant. Moreover, it is unclear why this testimony by DR would suggest that ZS was dreaming, and defendant fails to explain how the testimony could have been used to undermine the credibility

of EP's allegations.[2] Thus, defendant's claim of prejudice in this regard is unclear. Given the content of DR's testimony on which defendant now relies, defendant has not shown how knowing about this evidence earlier would have altered his trial strategy or changed the outcome of trial. Therefore, defendant has failed to show a plain error affecting his substantial rights.

III. DEFENDANT'S STATEMENT TO MEDICAL PERSONNEL

Next, defendant asserts that the trial court erred by excluding from evidence a statement he made during a dental appointment in which he received an antibiotic. Again, we disagree.

The appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). "The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls outside the range of principled outcomes." *Id*. at 251-252 (quotation marks and citation omitted.)

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. MRE 801(c). Hearsay is inadmissible at trial unless there is a specific exception allowing its introduction. MRE 802. MRE 803(4) provides an exception for

> [s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

The rationale supporting the admission of hearsay under MRE 803(4) is "(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992).

We agree with the trial court's reasoning that the statement in question was not reasonably necessary for diagnosis or treatment of defendant's dental issue, and thus not subject to the hearsay exception. Defendant reportedly suffered a "mild swelling around back lower tooth" and was prescribed an antibiotic. Defendant's hearsay statement that he was concerned about a court case involving a sexually transmitted disease was relevant to the subsequent criminal prosecution, thereby making the statement testimonial hearsay. Indeed, as the trial court noted, the defense's reasons for seeking admission of the statement, i.e., "it established that he didn't have chlamydia, and he didn't want anything that would show that he was using something to get rid of the chlamydia," was the very reason it was not admissible under MRE 803(4). In other words, MRE 803(4) was inapplicable because defendant's statement was not "reasonably necessary to [defendant's] diagnosis and treatment." Accordingly, the trial court's decision to exclude the

[2] On appeal, defendant's claimed value of this evidence is further belied by the fact that he was acquitted of any conduct pertaining to ZS.

challenged hearsay evidence is within the range of principled outcomes, and therefore, was not an abuse of discretion.

IV. DEADLOCKED JURY

Defendant further contends that the trial court erred when, after the jury declared that it was unable to reach a verdict on three separate occasions, the court instructed the jury to continue deliberating instead of sua sponte declaring a mistrial. We disagree.

Defendant acknowledges that he did not object to the trial court's instructions or to the court's handling of the matter, or request a mistrial. Therefore, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant not only failed to preserve this issue, but he waived any error by expressly agreeing to the trial court's handling of the matter. Specifically, on appeal, defendant takes issue with the trial court instructing the jury to continue deliberating after its third note, which reported that one juror was not cooperating. At trial, however, defendant agreed with the trial court's prior instructions, and most significantly after the last note, defense counsel expressed his satisfaction with the trial court's handling of the matter, stating:

> Your Honor, when you received that note, it was probably not more than minutes, before you read the—or after you read the deadlocked jury instruction.
>
> So, what we're lead, what we're lead to believe is that someone went in there, looked at that jury instruction, started underlining the various things that they're, the various issues that they're having, in terms of, with whatever this jury is, and sent it back to the Court.
>
> So, that person, and the rest of the jury, I don't think, had an opportunity to even start to deliberate, before that note came out.
>
> So, I, uhm, uh, have no objection with what you said, to this jury, when you brought them out, a second time, regarding this.
>
> And you asked them, basically, to follow the deadlocked jury instruction, and let's see what they do.

By expressly approving the jury instructions, defendant waived appellate review of this claim of instructional error. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). "A defendant waives an issue by expressly approving of the trial court's action." *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). "Waiver extinguishes any error, leaving nothing for this Court to review." *Id.* Thus, this issue is both unpreserved and waived on appeal. See *id.* Consequently, defendant is not entitled to a new trial on this basis.

V. PROSECUTOR'S REBUTTAL ARGUMENT

Defendant submits that the prosecutor's remarks[3] during rebuttal argument denied him a fair and impartial trial and improperly shifted the burden of proof by suggesting that defense counsel could have presented defendant's medical records and that defendant was trying to hide something. We disagree.

We review claims of prosecutorial misconduct on "a case-by-case basis" by reviewing the challenged conduct in context to determine whether defendant received a fair and impartial trial. *People v Brown*, 294 Mich App 377, 382-383; 811 NW2d 531 (2011).

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). "Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *Id*. However, prosecutors are afforded great latitude when arguing at trial, *id*. at 461, and may fairly respond to an issue raised by the defendant, *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). The prosecution may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

The prosecutor's remarks were not improper because they were responsive to defense counsel's closing argument. The challenged remarks, viewed in context, were part of a permissible argument that was specifically focused on countering defense counsel's claims made during closing argument. Specifically, after emphasizing the evidence that DR had been diagnosed with chlamydia on several occasions, and the lack of evidence that defendant had been diagnosed with any sexually transmitted disease after the alleged assaults, defense counsel argued:

> You didn't see any Michigan Department of Health and Human Services document, regarding this man, Mr. Floyd.
>
> You didn't see that.
>
> And the medical professionals are required to report that.
>
> I submit to you, he hasn't had any of these kinds of diseases.
>
> * * *

[3] To the extent defendant cites caselaw that analyzed a prosecutor's actions as misconduct, this Court has explained that a fairer label for most claims of prosecutorial misconduct would be "prosecutorial error," because only the most extreme and rare cases rise to the level of "prosecutorial misconduct." *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015). However, we will use the phrase "prosecutorial misconduct" because it has become a term of art in criminal appeals. *Id*.

So, she's getting it from somewhere, from somebody, other than Mr. Floyd.

And the Prosecutor wants to make an issue of this business of, uh, the Amoxicillin with Mr. Floyd.

We gonna talk about the lack of evidence, again.

The document that you will see, and I want you to look at it, where it talks about the Amoxicillin.

Now, at the corner of that document, it says, there's sixty-six pages, sixty-five pages.

Where are the other sixty-four?

What's the Prosecutor hiding?

Why didn't they admit.

It is a medical record, kept in the ordinary course of business.

It's not a hearsay document.

Why didn't they admit all of it?

What are they trying to have you not see?

And prior to the date that that Exhibit, uh, is dated, in terms of the admission of this treatment, which I think is September, did he have some kind of—did Mr. Floyd have some kind of, uhm, medical treatment, to this dental problem, prior to that?

What is it that they don't want you to see?

What is it that you—they don't want you to see?

The lack of evidence.

Implicit in the prosecution's theory was that EP contracted a sexually transmitted disease from defendant, and that defendant later obtained an antibiotic, allegedly for a dental infection, that treated the disease. Defendant denied any wrongdoing and part of his alternate exculpatory theory was that there was no evidence that he was diagnosed with chlamydia. Continuing this theory during closing argument, defendant asserted that DR had contracted chlamydia from someone other than defendant, implying that she transmitted the disease to EP, not defendant, and that this theory was supported by the prosecution's failure to present all of defendant's medical records. Given that defendant essentially proffered an argument that the evidence was insufficient to prove his guilt because of the prosecutor's failure to present all of defendant's medical records, the prosecutor permissibly responded that defendant also had the option to present his own medical records as exculpatory evidence. Further, while defendant complains that the prosecutor also

improperly accused defense counsel of trying to hide something, it was defense counsel who first repeatedly suggested to the jury that the prosecutor was hiding something by not presenting defendant's medical records. The prosecutor was merely responding in the same manner—using defense counsel's terminology—to support her responsive argument that defendant could have presented his own medical records as exculpatory evidence. Again, prosecutors may fairly respond to an issue raised by the defendant, *Brown*, 279 Mich App at 135, and they need not state their inferences in the blandest possible language. *Dobek*, 274 Mich App at 66. Consequently, the prosecutor's argument was responsive to the evidence and theories raised by the defense, and it did not shift the burden of proof.[4]

VI. SENTENCE

In his last claim, defendant asserts that he is entitled to resentencing on his CSC-I conviction because the trial court failed to offer sufficient reasons to support its decision to increase the statutory 25-year mandatory minimum sentence to 40 years. We disagree.

Because defendant was over 17 years old and he sexually penetrated a person under 13 years old, he was subject to the mandatory 25-year minimum sentence specified under MCL 750.520b(2)(b). Thus, 25 years essentially became the "de facto" guidelines number of years. See *People v Wilcox*, 486 Mich 60, 70, 72; 781 NW2d 784 (2010). The trial court imposed a minimum sentence of 40 years for defendant's CSC-I conviction, an upward departure from the mandatory minimum.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "Resentencing will be required when a sentence is determined to be unreasonable." *Id.* When reviewing a departure sentence for reasonableness, we must review "whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017); see also *People v Dixon-Bey*, 321 Mich App 490, 521; 909 NW2d 458 (2017).

[4] Even if we assumed that the prosecutor's remarks could be considered improper, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that defendant was not required to prove his innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and that the jury was to follow the court's instructions. These instructions were sufficient to dispel any perceived prejudice arising from the prosecutor's remarks and thereby protect defendant's substantial rights. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Jurors are presumed to have followed their instructions, see *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011), and defendant has not provided any basis for concluding that the jurors failed to do so in this case.

Although the sentencing guidelines are only advisory, *Lockridge*, 498 Mich at 365, "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts 'must consult' and 'take . . . into account when sentencing.' " *Steanhouse*, 500 Mich at 474-475, quoting *Lockridge*, 498 Mich at 391. "[D]epartures [from the sentencing guidelines range] are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing[.]" *Milbourn*, 435 Mich at 657. "The 'key test' is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Steanhouse*, 500 Mich at 472, quoting *Milbourn*, 435 Mich at 661. Factors that may be considered by a trial court under the proportionality standard include, but are not limited to:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*People v Walden*, 319 Mich App 344, 352-353; 901 NW2d 142 (2017) (citation omitted).]

If this Court "determines that [the] trial court has abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed, it must remand to the trial court for resentencing." *Steanhouse*, 500 Mich at 476.

In this case, the trial court gave several reasons for exceeding the 25-year mandatory minimum sentence. The court noted that a defendant had a relationship of trust with EP, and took advantage of that relationship and EP's vulnerability over many years. The statute in question encompassed any child under the age of 13, but the trial court noted that 10-year-old EP was younger and "knew things that no little girl should know." The court also observed that defendant had "groomed" EP, and then isolated her, making it more difficult for her to disclose what was happening. The court further observed that it could be inferred from the evidence that defendant did transmit chlamydia to the child. Additionally, the trial court recognized that defendant had attempted to touch EP's sister, DL, causing her to leave the home. The court remarked that defendant was allowed to continue the sexual abuse because of the physical abuse between him and DR. Finally, the trial court cited to defendant's menacing and intimidating looks directed at one of the daughters and DR when they testified. The record reflects that the trial court adequately explained its reasons for imposing the 40-year minimum sentence and why that sentence was more proportionate to the offender and the offense than the mandatory statutory minimum. The trial court's sentencing decision was comprehensive and rationally articulated. In light of the circumstances of this case, defendant's 40-year minimum sentence does not violate the principle of proportionality, and therefore, is not unreasonable. *Steanhouse*, 500 Mich at 459-460.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Brock A. Swartzle