STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN MAURICE HARDAWAY,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 353304
Macomb Circuit Court
LC No. 2018-003263-FC

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree criminal sexual conduct (CSC-I) (sexual penetration; perpetrator member of same household; victim at least 13 years old but less than 16 years old), MCL 750.520b(1)(b)(*i*), and second-degree criminal sexual conduct (CSC-II) (sexual contact; perpetrator member of same household; victim at least 13 years old but less than 16 years old), MCL 750.520c(1)(b)(*i*).[1] The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 96 to 444 months for the CSC-I conviction, and 96 to 270 months for the CSC-II conviction. We affirm, but remand for the ministerial purpose of correcting the judgment of sentence.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from sexual abuse allegations by the minor victim, KL, against defendant. In 2018, KL lived with her mother (Tyus), defendant, and defendant's two minor daughters. In June 2018, KL and defendant's daughters woke up at about 8:00 a.m. and started watching a television show in KL's bedroom. Shortly thereafter, defendant entered KL's bedroom, sat at the foot of KL's bed, and watched the television show with them. The group continued watching for several episodes. During this time, Tyus was asleep in her upstairs bedroom. At trial, KL testified

[1] Defendant was also charged with three additional counts of CSC-II. The jury acquitted defendant of one of those counts. The trial court granted defendant's motion for directed verdict as to the other two CSC-II charges.

that she and defendant's daughters were tired after watching television, so defendant's daughters left KL's bedroom. KL fell back to sleep but awoke to defendant touching her breasts for about a minute, over and under her shirt. Defendant asked KL, "[d]o you like that?", and told her to "shh." KL was not wearing underwear and testified that defendant pulled off her shorts and put his tongue on her vagina. Defendant stopped when he received a telephone call and then left the house to go to work.

After defendant left, KL put on different clothes, wrote a note to Tyus, put the note in Tyus's bathroom, and went to the nearby park. When Tyus woke up, she found the note in her bathroom, drove to the park, and saw KL crying under bleachers. After KL told Tyus about the incident, Tyus called defendant and asked how he could have done something to KL. Defendant told Tyus that KL was "fat" and to "put his stuff out on the porch," and hung up. Tyus then called the police and drove back to her house. Eastpointe Police Officer Alec Mikulec and Sergeant Robert Koenigsman responded and interviewed KL and Tyus. The officers also collected the shirt and shorts that KL was wearing during the incident. Officer Mikulec testified that he observed KL to be distraught and on the "verge of tears." While talking with the police, KL reported, in addition to the June 2018 incident, another sexual abuse incident with defendant that had occurred in April 2018. Tyus then took KL and defendant's daughters to a relative's house.

At trial, Jennifer Summers, a Michigan State Police forensic scientist, testified that she had tested the shorts that KL was wearing at the time of the incident for salivary alpha amoles, an enzyme present in saliva. Summers determined that saliva was present on the inside of KL's shorts near the inner leg seam. While Summers acknowledged that the enzyme could also be found in low levels in breast milk and fecal material, she explained that the test was geared for enzyme levels found in saliva and that she did not observe any fecal material or discoloration on the shorts. Summers collected swab samples of the saliva for DNA testing.

Catherine Maggert, a Michigan State Police forensic scientist, testified that DNA from two individuals was present on KL's shorts and that, using STRmix software, she had determined that there was "very strong support that [defendant] [was] a contributor to the DNA profile from the shorts[,]" along with KL. Maggert also conducted a three-person mixture DNA test and determined from those results that there was very strong support for the conclusion that defendant was a contributor to the DNA on KL's shorts. Further, Katie Urka, a Michigan State Police forensic scientist, testified that she performed a YSTR test on the swab sample from KL's shorts, which identified defendant, or another paternally-related male, as a contributor to the DNA on KL's shorts.

During its case-in-chief, the prosecution sought to admit screenshots (photographs) of a text message conversation between defendant and Tyus after the June incident. After defendant's initial objection to their admission for lack of foundation, the screenshots were admitted at trial. While some of the screenshots bore a date and appeared to be in chronological order, it was apparent from their content that the screenshots did not contain all of the text messages exchanged between defendant and Tyus in the week after the incident. The contents of the screen-shot text messages included defendant: (1) threatening to post nude photographs of Tyus on social media if she did not answer defendant's telephone calls, (2) accusing Tyus of being involved with "another man," (3) asking to speak to KL to make "peace with everyone before I go," (4) asking Tyus to

marry him, (5) pleading with Tyus to come home and call him, and (6) falsely telling Tyus their vehicle had been repossessed.

KL testified at trial regarding the June and April incidents, and also testified at trial that, in February 2018, defendant had touched her legs and buttock with his foot while she, defendant, and defendant's daughters watched television in defendant's and Tyus's bedroom.

After the close of the prosecution's proofs, defendant moved for a directed verdict, arguing that there was no evidence to support the conclusion that any sexual misconduct had occurred in April 2018, thus warranting dismissal of two of the CSC-II counts. The prosecution agreed, noting that KL had testified that she could not recall any details regarding the April incident. The trial court granted defendant's motion with regard to the two counts of CSC-II that were based on the April 2018 incident. It denied defendant's motion for directed verdict regarding the February 2018 incident; the jury later acquitted defendant of that charge.

The trial then continued, and one of defendant's daughters testified regarding the June incident. She stated that, after watching television in KL's bedroom, KL started wrestling with defendant, wrapping her leg around defendant's neck. She testified that defendant told KL to put on some clothes and pushed her off of him, causing KL to fall to the ground. When KL fell, the television stopped working, so KL turned on music and started dancing. Defendant again told KL to put on some clothes and turn off the music. Defendant was sitting on the bed when defendant's daughter left the bedroom. When defendant's daughter came back into KL's bedroom, KL told her to get out, which she did, and defendant followed her out of the bedroom. Defendant's daughter watched defendant leave for work. Defendant's daughter then went to her bedroom to sleep; she later woke up to Tyus leaving the house, stating that she would be right back. Shortly thereafter, Tyus and KL came back to the house, followed by the police.

Defendant denied any wrongdoing. Similar to his daughter, defendant testified that KL had wrapped her leg around his neck and had fallen to the floor after he pushed her off of him. While KL and his daughters were trying to get the television working again, defendant received a telephone call and left KL's bedroom to continue the call. Defendant testified that KL came out of her bedroom a short time later, asking defendant to take her cellphone to be fixed because of a cracked screen; however, defendant told KL that he did not have time to get it fixed. Defendant then left for work. Defendant stated that he received a telephone call from Tyus about an hour after he left, and that Tyus asked if he had touched KL. Defendant replied to Tyus that the allegation was "B.S." and hung up. Defendant stated that when he tried to call Tyus back there was no answer. Defendant testified that when he returned home, there was no one at the house and Tyus continued to not answer his telephone calls. Defendant testified that he believed Tyus and KL had "planted" his DNA on KL's shorts.

Defendant was convicted and sentenced as described. This appeal followed.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that he is entitled to a new trial because the guilty verdicts were against the great weight of the evidence. We disagree.

Generally, a claim that a verdict is against the great weight of evidence is preserved by filing a timely motion for a new trial. *People v Lopez*, 305 Mich App 686, 695; 854 NW2d 205 (2014); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Defendant did not file a timely motion for a new trial in the trial court; therefore, defendant's claim is unpreserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *Musser*, 259 Mich App at 218; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A new trial may be granted if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). A verdict is against the great weight of the evidence "only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Determining whether a verdict is against the great weight of the evidence requires review of "the whole body of proofs, which necessarily includes an evaluation of the credibility of the witnesses." *People v Lemmon*, 456 Mich 625, 638-639; 576 NW2d 129 (1998) (quotation marks and citation omitted).

A request for new trial that is based solely on the weight of the evidence regarding witness credibility is not favored, and should be granted only with great caution and in exceptional circumstances. *Lemmon*, 456 Mich at 639 n 17. Conflicting testimony, even if impeached to some extent, is not a sufficient ground for granting a new trial. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). However, a narrow exception to this rule exists when witness testimony contradicts "indisputable physical facts or laws" or "defies physical realities." *Lemmon*, 456 Mich at 647.

The essential elements required to commit CSC-I include: (1) the defendant sexually penetrated another person, (2) the other person was at least 13 but less than 16 years of age, and (3) the defendant is a member of the same household as the victim. *People v Phillips*, 251 Mich App 100, 102; 649 NW2d 407 (2002); MCL 750.520b(1)(b)(*i*). The term "sexual penetration" is statutorily defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r).

The essential elements of CSC-II are: (1) the defendant engaged in sexual contact with another person, (2) the other person was at least 13 but less than 16 years of age, and (3) the defendant is a member of the same household as the victim. *People v Nyx*, 479 Mich 112, 115-116; 734 NW2d 548 (2007); MCL 750.520c(1)(b)(*i*). "Sexual contact" is statutorily defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q). "[W]hen determining whether touching could be reasonably construed as being for a sexual purpose, the conduct should be viewed objectively under a reasonable person standard." *People v DeLeon*, 317 Mich App 714, 719-720; 895 NW2d 577 (2016).

Defendant argues that the jury's guilty verdicts were against the great weight of the evidence because the DNA evidence on KL's shorts did not rule out a natural transfer or an

intentional transfer by Tyus or KL. Defendant also points to inconsistencies in KL's and Tyus's recollections of the events, and contends that KL had a motive to manufacture allegations against defendant.

However, despite minor inconsistencies regarding the time of the incident, KL's testimony was largely corroborated by other evidence presented at trial. KL testified, in detail, that defendant sexually abused her. Further, the DNA evidence admitted at trial established that there was a very strong likelihood that defendant's saliva was on KL's shorts. Although defendant argues that the DNA could have been from fecal matter or could have been present on KL's shorts as a result of natural transfer or intentional transfer by KL or Tyus, the jury was free to draw the inference that saliva was present as a result of the sexual abuse to which KL testified. Similarly, although defendant testified that KL wrapped her leg around his neck shortly before the alleged incident occurred, which could have resulted in DNA transfer, the jury was free to find KL's testimony more credible than defendant's. Additionally, Summers specifically testified that she did not see any fecal material or discoloration on the shorts and indicated that she would have sought a second verification of the results if she was not confident in the results. Summers also testified that, after identifying saliva on KL's shorts, Summers then collected swab samples from "this inner crotch area, along the seam lines, and a little bit inward, towards the center crotch area," for DNA testing. This testimony supports the inference that defendant's saliva was found on the inside of KL's shorts, near her genital area, and therefore corroborates KL's testimony that defendant touched her vagina with his tongue.

Moreover, other witnesses at trial largely corroborated KL's testimony about the incident. Tyus testified to finding the note from KL in the bathroom. When Tyus went to the nearby park, she observed KL crying. KL then told Tyus that defendant had tried to perform oral sex on her in her bedroom. In addition, when Officer Mikulec arrived at the house, he observed KL to be upset and "on the verge of tears" when she reported that defendant had touched her breasts, and that he had touched her vagina with his tongue, before leaving for work that day. Further, defendant's daughter recalled that when she and defendant's other daughter left KL's bedroom, defendant was sitting on KL's bed. After defendant left for work, defendant's daughter went to sleep and was awaken as Tyus left to pick up KL.

Defendant argues that factual discrepancies between the statements KL made in reporting the abuse, including different estimates of the specific time of the incident and differing statements regarding whether defendant pulled off KL's shorts or pushed them to the side during the incident, diminishes their credibility. However, despite these minor discrepancies in KL's statements, her testimony was not contradicted by physical facts or law. *Lemmon*, 456 Mich at 646-647. The jury weighed KL's testimony along with all of the other evidence, including defendant's testimony (in which he speculated that his DNA was intentionally transferred to KL's shorts because KL was frustrated that defendant had failed to fix her cellphone), and concluded that KL was credible and defendant was not. *Id*. at 647. As stated, this Court will not substitute its view on the issue of witness credibility for that of the fact-finder "absent exceptional circumstances." *Id*. at 642. Because defendant has failed to point to any exceptional circumstance that would warrant this Court impinging on the jury's credibility determinations, defendant has not demonstrated plain error affecting his substantial rights. *Musser*, 259 Mich App at 218.

III. ADMISSION OF SCREENSHOTS OF TEXT MESSAGES

Defendant also argues that the trial court improperly admitted the screenshots of text messages between defendant and Tyus in violation of MRE 106. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objections that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). Because defendant only objected at trial to the admission of the text messages for lack of foundation, the issue is not preserved for appellate review. *Id*.

Generally, we review for an abuse of discretion the trial court's decision to admit or exclude evidence. *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014). However, as stated, we review unpreserved evidentiary issues for plain error affecting a defendant's substantial rights. *Musser*, 259 Mich App at 218.

Beyond defendant's vague contention that the trial court erred by admitting the text messages, defendant provides no argument or authority in support of his evidentiary claim, outside of a brief reference to MRE 106. Rather, defendant's evidentiary argument largely centers on his ineffective assistance of counsel argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant's failure to provide any analysis or authority in support of his evidentiary claim, beyond citing to MRE 106, renders it abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

In any event, our review of the record shows that the trial court's admission of the screenshots of the text messages between Tyus and defendant after the incident did not violate MRE 106. MRE 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." MRE 106. "MRE 106 does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions a portion of it. Rather, MRE 106 logically limits the supplemental evidence to evidence that ought in fairness to be considered contemporaneously with it." *People v Herndon*, 246 Mich App 371, 412 n 85; 633 NW2d 376 (2001). A review of the record indicates that the prosecution sought to admit the screenshot text messages to show that defendant wanted to "make if peace [sic] with everyone," (which, the prosecution argued, implied that defendant wanted to apologize to KL), and as evidence of defendant's overall conduct after the incident. In fact, the admitted text messages were largely unrelated to the sexual abuse allegations. Moreover, while defendant objected for lack of foundation, defendant failed to raise any other objection to the admission of the text messages, failed to invoke MRE 106, and failed to request that the trial court admit all of the text messages exchanged between defendant and Tyus. Further, we note that defendant admitted to sending the text messages contained in the screenshots and, therefore, was likely to already be in possession of all the text messages but declined the opportunity to offer them into evidence at trial. Nor does defendant identify on appeal what additional text messages he would have offered into evidence. Defendant has not demonstrated plain error. *Musser*, 259 Mich App at 218.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that his trial counsel was ineffective for failing to subpoena all the text messages between defendant and Tyus and by failing to object to the prosecution's request to admit the screenshot messages (without admitting all of them). We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*. Because no *Ginther*[2] [hearing was held, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), reh den 447 Mich 1202 (1994). To establish prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant was not denied the effective assistance of counsel. Defendant contends that if trial counsel had properly investigated and reviewed the discovery, he would have known that he should have subpoenaed all the text messages. A failure to conduct a reasonable investigation can amount to ineffective assistance. *People v Trakhtenberg*, 493 Mich 38, 51-55; 826 NW2d 136 (2012). A review of the record indicates, however, that trial counsel did request discovery of all "all writings, statements, audio tapes, video tapes, photographs or other recordings concerning [d]efendant, the [victim][,] and any other witnesses concerning the charges in this case which may or may not be used as evidence" before trial. Defendant received the screenshots that Tyus had given to the prosecution during discovery. During trial counsel's cross-examination, Tyus stated that she took the screenshots of the text messages, which did not include all the text messages between her and defendant, and gave all of the screenshots to the prosecution. She further stated that, after taking the screenshots, she deleted the text messages and no longer had the cellphone. On this basis, even if trial counsel had demanded all of the text messages from the prosecution, the prosecution would not have been able to produce any additional messages. Additionally, defendant does not explain why he could not have reproduced those messages from his own cellphone instead of relying on the prosecution to provide screenshots from Tyus's phone.

Further, defendant has not established that the outcome of his trial would have been different had trial counsel obtained additional text messages via subpoena. In fact, beyond broadly stating what trial counsel should have done, defendant fails to argue how the text messages would

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

have affected his trial at all. The record indicates that the jury relied more heavily on witness testimony and the DNA evidence than the text messages, because those messages did not explicitly reflect any admission by defendant to having sexually abused KL. And the witness testimony and DNA evidence were more than sufficient to establish the elements of the crimes for which defendant was convicted. Since defendant has not established that the outcome of his trial would have been different, he was not denied the effective assistance of counsel.

In addition, defendant argues that his trial counsel should have objected to the admission of the text messages under MRE 106, and that the burden then would have shifted to the prosecution to provide the balance of the text messages. However, as stated, supplemental evidence under MRE 106 is limited to evidence that "ought in fairness to be considered[,]" and defendant has failed to establish why "fairness" required the admission of all of the text messages. *Herndon*, 246 Mich App at 412 n 85. In fact, outside of the text messages arguably reflecting a desire to apologize to KL, the text messages were largely unrelated to the sexual abuse allegations. And, as we have noted, it appears from the record that the prosecution and Tyus were not in possession of any additional messages. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Under the circumstances of this case, trial counsel's failure to object to the text messages under MRE 106 did not fall below an objective standard of reasonableness. *Id.*; *Pickens*, 446 Mich at 338.

Even if trial counsel's performance in failing to object to the admission of the screenshot text messages under MRE 106 *was* objectively unreasonable, defendant has not established that the outcome of his trial would have been different had trial counsel raised this issue. There was a considerable amount of other evidence, outside of the text messages, supporting the prosecution's argument that defendant had sexually abused KL. Consequently, even if trial counsel should have objected to the admission of the screenshot text messages under MRE 106, defendant has not established that the outcome of his trial would have been different. *Johnson*, 451 Mich at 124. Therefore, defendant was not denied the effective assistance of counsel. *Id.*

V. CORRECTION OF JUDGMENT OF SENTENCE

Defendant also argues that the judgment of sentence should be amended to reflect that he was acquitted of two counts of CSC-II as a result of defendant's motion for a directed verdict, rather than listing those charges as having been dismissed by the prosecution. The prosecution agrees with defendant's argument. So do we.

MCR 6.435(A) states, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it." MCR 6.435(A). "Due process commands a directed verdict of acquittal when sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt . . . is lacking." *Lemmon*, 456 Mich at 633-634 (quotation marks and citation omitted).

A review of the record in this case indicates that defendant moved for a directed verdict, during trial, on two counts of CSC-II, and that the trial court granted defendant's motion. However, the prosecution at sentencing mistakenly informed the trial court that the trial prosecutor

had voluntary dismissed these counts, and the trial court so indicated on the judgment of sentence. Because counts IV and V were actually dismissed by the trial court as a result of defendant's directed verdict motion, and were thus removed from the verdict form, amendment to the judgment of sentence is necessary so that it will reflect acquittals on two counts of CSC-II, counts IV and V, instead of dismissals by the prosecution. Accordingly, remand to the trial court is appropriate for the ministerial task of correcting this clerical error in the judgment of sentence. MCR 6.435(A); MCR 7.216(A)(7).

Affirmed and remanded solely for the ministerial task of correcting the clerical error in the judgment of sentence regarding the two counts of CSC-II as to which a directed verdict was granted. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra