STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AYMA JAHMAL CAMPBELL,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 353690
Wayne Circuit Court
LC No. 19-008168-01-FH

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right after his jury-trial convictions of using a computer to commit a crime, MCL 752.797(3)(f), accosting a minor for immoral purposes, MCL 750.145a, and disseminating sexually explicit matter to a minor, MCL 722.675.[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to serve 7 to 20 years' imprisonment for the computer-use conviction, and 5 to 15 years' imprisonment each for the accosting and disseminating convictions. We affirm.

I. FACTUAL BACKGROUND

This case arises from events that took place in early 2019, when the complaining witness was 14 years old. The complainant's grandmother had acquired temporary custody of the complainant and the complainant's mother was allowed supervised visitation. The prosecution presented evidence that the complainant and her mother were alone in the complainant's bedroom when the mother began video chatting with defendant. During the video chat, the mother told the complainant that defendant had admitted to having sexual dreams involving the complainant, and then she offered the complainant marijuana. Defendant then described dreaming of sexual activity with the complainant and her mother. Defendant also told the complainant that he had previously had a "mother/daughter thing," which the complainant interpreted to mean that defendant had had

[1] The jury found defendant not guilty of one count of child sexually abusive activity, MCL 750.145c(2).

sexual relations with another mother and daughter. Around the time that defendant told the complainant about his sexual dreams, the complainant's mother told the complainant that she had lost her virginity to an older man. The complainant believed that her mother wanted her to have sex with an older man. Sometime after defendant told her about his dream, the complainant asked her mother to rub her stomach because of pain, but the mother touched near the complainant's breasts and underwear. While the mother touched the complainant, she told the complainant that the complainant would "grow more fuller."

The following day the complainant and her mother met defendant at a bus stop. The three walked to a nearby motel where defendant rented a room. Inside the room, defendant offered the complainant marijuana, which she declined. Afterwards, she and her mother entered the bathroom in response to a call on the complainant's cell phone. The mother left the bathroom before the call was over. The complainant left the bathroom after the call ended. When the complainant exited the bathroom, the television was displaying pornography and defendant was holding its remote control. The complainant returned to the bathroom in disgust. Her mother and defendant apologized and defendant tried to hug her. Later, defendant and the complainant's mother entered the bathroom and produced "whimpering" sounds that the complainant recognized as indications of sexual intercourse. The complainant banged on the wall and told them to stop, and she turned up the volume on the television set. Eventually all three left the motel. Afterward, the complainant disclosed the two incidents to her grandmother, who contacted Child Protective Services (CPS).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to sustain his convictions. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). The evidence must be viewed "in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt." *People v Levigne*, 297 Mich App 278, 281-282; 823 NW2d 429 (2012). It is the role of the trier of fact to determine the weight of the evidence and evaluate the credibility of witnesses. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Id*. at 622.

A. USING A COMPUTER TO COMMIT A CRIME

To convict a defendant of using a computer to commit a crime, MCL 752.796(1) provides that "[a] person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime." "Computer" is defined as

> any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of

> the operations to a person, computer program, computer, computer system, or computer network. [MCL 752.792(3).]

A defendant may be convicted of this offense "regardless of whether the person is convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense." MCL 752.796(3).

In the instant case, the underlying offense for this charge was producing child sexually abusive activity, MCL 750.145c(2). Under MCL 750.145c(2), a person "who arranges for, produces, makes, copies, reproduces, or finances . . . any child sexually abusive activity" is subject to criminal penalties.[2] "Child sexually abusive activity" is defined as a child "engaging in a listed sexual act." MCL 750.145c(1)(n). "Listed sexual act" includes "erotic fondling." MCL 750.145c(1)(i). "Erotic fondling" is defined as

> [T]ouching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. Erotic fondling does not include physical contact, even if affectionate, that is not for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. [MCL 750.145c(1)(g).]

"MCL 750.145c(2) does not actually require conduct involving a minor. Rather, it only requires that the defendant prepare to arrange for child sexually abusive activity." *People v Aspy*, 292 Mich App 36, 43; 808 NW2d 569 (2011) (cleaned up). Further, "[t]he statute does not require that those preparations actually proceed to the point of involving a child." *Id.* (cleaned up).

At the outset, defendant does not dispute that a cellular phone fit the statutory definition of "computer," or that the complainant was a child at the time of the incidents in question. Rather, defendant argues that there was no evidence that he intended to produce or that he actually produced child sexually abusive material during the video chat in evidence. We note, however, that the underlying charge of child sexually abusive activity, as reflected in the jury instructions, was not predicated on the creation of child sexually abusive material.

Defendant also asserts there was no evidence that he arranged for child sexually abusive activity, or attempted, prepared, or conspired to arrange for the same. He argues that his description of sexual dreams involving the complainant and his statement that he had sexual relations with a mother and daughter in the past did not show that he attempted to arrange child sexually abusive activity in this instance. Defendant further asserts that sexually explicit conversations are not sufficient to establish child sexually abusive activity. He also argues that he

[2] Although there are other grounds to convict a defendant listed under MCL 750.145c(2), defendant's felony information and the jury instructions at trial for the charges of child sexually abusive activity and using a computer to commit a crime reflected only this portion of MCL 750.145c(2).

did not ask the complainant's mother to touch the complainant during the video chat, or otherwise ask the complainant and her mother to jointly engage in sexual activity with him.

To support his contention that a sexually explicit conversation is not sufficient to show that he attempted child sexually abusive activity, defendant relies on *People v Adkins*, 272 Mich App 37, 42-44; 724 NW2d 710 (2006). In *Adkins*, the defendant "admitted that he communicated in an explicitly sexual manner with perceived 14-year-old [child] in an attempt to arrange to meet him for the purpose of engaging in sexual contact." *Id*. at 44. This Court concluded that "the plain language of [MCL 750.145c(2)] unambiguously encompasses defendant's attempt or preparation to engage in child sexually abusive activity." *Id*. at 48. Specifically, the Court determined that MCL 750.145c(2) "applie[d] to defendant's admitted conduct in attempting to solicit a perceived 14-year-old boy for the purpose of engaging in sexual contact . . . ." *Id*. at 49.

The statute that prohibits using a computer to commit a crime imposes criminal liability for not only committing, but also attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense. MCL 752.796(1). In this case, as noted, the complainant testified that defendant described his sexual dreams involving her and her mother during a video chat. He also mentioned that he had engaged in a "mother/daughter thing" before, which the complainant understood to mean that defendant "had sexual intercourse with" the "mother and daughter of someone else." And, as also noted, the complainant testified that around the time that defendant told her about his dreams, her mother said that "she lost her virginity to a[n] older man."

As the video chat with defendant continued, the complainant asked her mother to rub her stomach area and the mother's hand went "[j]ust underneath [the complainant's] breast . . . and then on [her] panty line just at the top," during which the mother said "you'll grow more fuller." The complainant further testified that her mother said that "she wanted to touch [the complainant's] lower regions" after defendant described his dreams. The following day, the complainant's mother took her to meet defendant at a bus stop. The three proceeded to the motel, where defendant, as indicated earlier, offered the complainant marijuana, displayed pornography, and engaged in other behavior.

Considering the above evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that defendant attempted, conspired, or solicited the complainant's mother[3] to commit the underlying offense of child sexually abusive activity. *Levigne*, 297 Mich App at 281-282. The fact that the jury acquitted defendant of the child sexually abusive activity charge did not disturb its ability to find defendant guilty of using a computer for that purpose. See MCL 752.796(3). Generally, "[i]nconsistent verdicts within a single jury trial are permissible, and do not require reversal absent a showing of confusion by the jury, a misunderstanding of the instructions, or impermissible compromises." *People v Montague*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 352089); slip op at 10. "Juries are not held to any rules of logic nor are they required to explain their decisions." *Id*. at ___; slip op at 10 (cleaned

[3] The complainant's mother was charged as defendant's codefendant. She ultimately pleaded guilty to third-degree child abuse, MCL 750.136b(5).

up). Therefore, we conclude that there was sufficient evidence for a jury to convict defendant of using a computer to commit a crime under MCL 752.796.

B. ACCOSTING A MINOR FOR IMMORAL PURPOSES

Although defendant acknowledges that he may have "assailed" the complainant with his words, he argues that there was insufficient evidence to sustain his conviction of accosting a minor for immoral purposes because there was no evidence that defendant intended to induce or force the complainant to have sexual intercourse. Defendant's argument lacks merit.

MCL 750.145a provides as follows:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony . . . .

"Because the Legislature used the disjunctive term 'or,' it is clear that there are two ways to commit the crime of accosting a minor." *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011).

> A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act. Taken as a whole, the statute permits conviction under two alternative theories, one that pertains to certain acts and requires a specific intent and another that pertains to encouragement only and is silent with respect to *mens rea*. [*Id.*]

In the instant case, the jury was instructed on only accosting, enticing, or soliciting. Therefore, the prosecution was obliged to prove "a specific intent to induce or force the child to commit proscribed acts; it is not enough for the prosecution to merely establish that the defendant committed acts of accosting, enticing, or soliciting." *Id.* at 500.

The statute does not define the terms "accost," "entice," "solicit," or "induce." Accordingly, we may seek the assistance of a dictionary for the purpose of "construing those terms in accordance with their ordinary and generally accepted meanings." *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008) (cleaned up). "Accost" means "to approach and speak to often

in a challenging or aggressive way." *Merriam-Webster's College Dictionary* (11th ed). "Entice" means "to attract artfully or adroitly or by arousing hope or desire." *Merriam-Webster's College Dictionary* (11th ed). "Solicit" means "to approach with a request or a plea," "to urge . . . strongly," or "to entice or lure especially into evil." *Merriam-Webster's College Dictionary* (11th ed). "Encourage" means "to inspire with courage, spirit, or hope" or "to attempt to persuade." *Merriam-Webster's College Dictionary* (11th ed). "Induce" means "to move by persuasion or influence" or "to call forth or bring about by influence or stimulation." *Merriam-Webster's College Dictionary* (11th ed).

In this case, while there was no evidence that defendant intended to force the complainant to engage in a proscribed sexual act, there was sufficient evidence for a rational trier of fact to conclude that defendant accosted, enticed, or encouraged her with the intent to induce her to engage in such an act. As discussed above, the evidence indicated that defendant described his sexual dreams involving the complainant and her mother during the video chat and suggested that he had had sex with a mother and a daughter before. On the next day, defendant met with the complainant and her mother, rented a motel room, offered the complainant marijuana in the room, and was holding the remote control for the room's television while the television was displaying pornography. Therefore, the evidence was sufficient to permit a rational trier of fact to find that defendant accosted, enticed, or solicited the complainant with words and actions intended to induce her to engage in a proscribed act.

C. DISSEMINATING SEXUALLY EXPLICIT MATTER TO A MINOR

Defendant asserts that there was insufficient evidence to support his conviction of disseminating sexually explicit matter to a minor because there was no evidence that defendant exhibited or presented a performance of pornography to the complainant. This argument is unpersuasive.

MCL 722.675 provides, in relevant part, as follows:

> (1) A person is guilty of disseminating sexually explicit matter to a minor if that person does either of the following:
>
> (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
>
> (b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

MCL 722.671(c) provides as follows:

> "Exhibit" means to do 1 or more of the following:
>
> (*i*) Present a performance.
>
> (*ii*) Sell, give, or offer to agree to sell or give a ticket to a performance.

(*iii*) Admit a minor to premises where a performance is being presented or is about to be presented.

"Sexually explicit matter" includes a "sexually explicit performance" and "sexually explicit visual material." MCL 722.673(f). "Sexually explicit performance" means "a motion picture . . . show, representation, or other presentation, that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse." MCL 722.673(g). The definition of "sexually explicit visual material" includes a "motion picture film" or "similar visual representation that depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse . . . ." MCL 722.673(i).

In this case, defendant argues that he could not have intended to exhibit the pornography to the complainant. Although defendant does not deny that he watched pornography in the motel room, he argues that he did not exhibit it to complainant because she went into the bathroom to answer a telephone call and he had no idea how long she would remain away from the television.

However, even though defendant did not know precisely when the complainant would exit the motel room's bathroom, the evidence indicated that he failed to recognize the circumstances indicating that the complainant would reenter the room after her mother left the bathroom. The complainant testified that her mother left the bathroom before her and that the television was displaying pornography when the complainant left the bathroom. After seeing the pornography, the complainant went back into the bathroom and asked that it be turned off. We conclude that the evidence that defendant persisted in displaying pornography, even after the complainant's mother returned from the bathroom until the complainant herself did so, permitted a rational trier of fact to infer that defendant intended to exhibit or present a performance of pornography to the complainant.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts that he was denied the effective assistance of counsel on the ground that counsel failed to investigate or adequately prepare for trial and sentencing. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must file a motion for a new trial or a *Ginther*[4] hearing to develop a record to support the claim. *People v Abcumby-Blair*, ___ Mich App___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8. Defendant filed a motion for a *Ginther* hearing in this Court, which we denied.[5] Therefore, our review is limited to the existing the record. *Id*. at ___; slip op at 8.

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51;

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

[5] *People v Campbell*, unpublished order of the Court of Appeals, entered January 15, 2021 (Docket No. 353690).

826 NW2d 136 (2012). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id*. See also *Strickland v Washington*, 466 US 668, 694-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

"Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases," and "[t]here is accordingly a strong presumption of effective assistance of counsel." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). "This Court will not substitute its judgment for that of defense counsel or review decisions with the benefit of hindsight." *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

"An attorney's decision whether to retain witnesses . . . is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A defendant need not show that his or her attorney's decision to not call witnesses deprived the defendant of a substantial defense. Rather, the decision to call witnesses is "analyzed under the same standard as all other claims of ineffective assistance of counsel . . . ." *People v Jurewicz*, 506 Mich 914, 915; 948 NW2d 448 (2020).[6] "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

That a particular strategy ultimately failed does not demonstrate that a defendant was denied the effective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Speculation that a different outcome may have occurred is not sufficient to demonstrate prejudice. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Further, "[f]ailing 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).

"Yet a court cannot insulate the review of counsel's performance by calling it trial strategy." *Trakhtenberg*, 493 Mich at 52. "[A] court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. (cleaned up). "Counsel always retains the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. (cleaned up).

[6] An order of the Michigan Supreme Court is "binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012).

A. FAILURE TO INVESTIGATE

Defendant contends that he was denied the effective assistance of counsel because his trial counsel failed to conduct a reasonable investigation in three areas. We will address each in turn.

First, defendant argues that trial counsel improperly solicited testimony about a previous incident involving defendant and the complainant. During direct examination, a companion of the complainant's father testified that she previously met defendant during the complainant's eighth-grade graduation ceremony. During cross-examination, defense counsel asked the witness if she previously referred to defendant as being a "positive role model." The witness answered that that was the "way [defendant] was described" to her. But the witness continued, "on the day of the graduation . . . [the complainant] did let us know . . . that [defendant] was touching her un-appropriately [sic] on her back and it was taken up then and we then let him and [the complainant's mother] know that's not right and they walked out of the school mad, upset, cause [sic] they got confronted." Next, defense counsel asked if the witness called the police at the time, and the witness replied that neither she nor anyone else called the police or CPS about that incident.

Defendant does not explain how the witness's nonresponsive answer shows that defense counsel failed to conduct a reasonable investigation, including why counsel should have anticipated that the witness would volunteer information beyond answering the question posed. Moreover, given that the witness testified that there was no indication that the police or CPS were notified about the incident mentioned at the graduation, it is unclear how defense counsel might have learned about that incident before trial.

Defendant focuses his criticism on defense counsel's decision to continue to question that witness about the graduation incident, rather than ask the trial court to direct her to answering the question posed. Therefore, defendant calls into question the propriety of defense counsel's on-the-spot strategic response to a witness's nonresponsive answer. Again, decisions regarding whether to question witnesses are presumed to be matters of trial strategy, *Rockey*, 237 Mich App at 76, and speculation that a different outcome may have occurred does not demonstrate prejudice, *Avant*, 235 Mich App at 508. Therefore, defendant's critique of his trial attorney's response to the nonresponsive answer, and his speculation that a different outcome may have occurred, are not enough to show that he was denied the effective assistance of counsel.

Next, defendant contends that defense counsel failed to conduct a reasonable investigation because, during cross-examination, the complainant testified that defendant was part of a 2018 incident involving a motel room that resulted in the complainant's mother losing custody of the complainant and her siblings.

The complainant's grandmother testified that she was granted temporary custody of the complainant and her siblings in 2018, after the complainant reported an incident in which her mother placed her and the other children in a hotel room bathroom while there were "adults" on the "other side of the room." The complainant, during direct examination, testified that she was not worried about going to a motel with her mother and defendant in 2019 because "it wasn't the first time [she] had been to a motel with them," and that her siblings were present on those previous occasions. Later, regarding the 2019 motel incident, the complainant testified that her mother and defendant went into the motel room's bathroom together and that she heard sounds that caused her

to believe that her mother and defendant were having sexual intercourse. She testified that this was not something defendant and her mother had done in her presence before.

During cross-examination, defense counsel asked the complainant if her mother had taken her to motels in the past, and if that had anything to do with why her grandmother was granted custody of the complainant and her siblings. The complainant replied affirmatively to both questions. Defense counsel also asked if defendant was present at "that incident," apparently referring to the 2018 hotel incident. The complainant replied that defendant was and stated she had informed a school official about it.

After the complainant's testimony, defense counsel asserted that he did not receive any information regarding the 2018 hotel incident. The prosecutor responded that she also did not have that information or otherwise know if defendant was involved in that incident. Defense counsel then recalled a police sergeant, who testified that she did not look at any CPS records during her investigation and saw no reference to an investigation from 2018. The officer further testified that, when she spoke to a CPS worker during her investigation, the CPS worker did not mention any other claims that the complainant had raised against defendant.

Defendant asserts that he was prejudiced by defense counsel's failure to investigate because the complainant presented information about an alleged prior bad act by defendant, which was exposed only when defense counsel asked the complainant—apparently without knowing how she would answer—if defendant was present during the 2018 hotel incident that lead to her mother losing custody of her children. Once again, defendant does not explain how counsel's questioning of the complainant showed that he did not conduct a reasonable investigation where both defense counsel and the prosecuting attorney were unaware of defendant's potential involvement in the 2018 incident. Further, whether or not defense counsel should have been aware that defendant was involved in the 2018 incident, defendant does not show how any lack of such awareness resulted in prejudice.

We conclude that defense counsel's decision to not elicit further testimony from the complainant regarding the 2018 hotel incident was prudent, given that her grandmother described only that the complainant and her siblings were placed in a hotel room's bathroom during the 2018 incident. The testimony left the exact nature of the 2018 incident unclear and showed only that it resulted in the complainant's mother losing custody of her children. The complainant's other testimony supported an inference that defendant was not involved in prior bad acts with the complainant, given that she testified that she was comfortable going to a motel with defendant and her mother in 2019 because they had done so before, and that defendant and her mother had not engaged in sexual conduct around her before the 2019 motel incident. The decision to recall the police sergeant was also a sound attempt to mitigate the testimony regarding defendant's alleged involvement in the 2018 incident because the police sergeant testified that there was no mention of defendant being involved in a prior CPS investigation. For these reasons, defendant cannot show that he was prejudiced by defense counsel's purported lack of preparation in relation to the alleged 2018 motel incident.

Third, defendant contends that defense counsel failed to conduct a reasonable investigation because he decided to not call the complainant's mother as a witness during trial. During the last day of trial, the complainant's mother was brought into the courtroom. Defense counsel explained

that he listed the complainant's mother on his witness list, but had lacked "access to her," and he asked the trial court to grant him "five minutes to speak with her." The trial court observed that the complainant's mother was currently represented by counsel, and that she had not yet been sentenced for her guilty plea, and therefore "arguably [had] a 5th Amendment right."

The trial court informed defense counsel that he would be allowed a few minutes to call the complainant's mother's attorney. The trial court also asked if defense counsel had spoken with the mother's counsel before. Defense counsel replied that he had spoken with the mother's attorney during trial, who knew that he might "want to talk to" the mother, but that he did not serve the mother with a subpoena because he was "unable to find out where she was staying."

After a brief recess, proceedings resumed, and the trial court reiterated that the complainant's mother had not yet been sentenced for her guilty plea stemming from the same allegations raised against defendant. Defense counsel explained that he decided not to call the mother as a witness because he did not have "an opportunity to prepare" for the mother's testimony. The mother's own attorney stated that she advised her client not to testify, and that the complainant's mother preferred not to testify even if she were sentenced beforehand. Defense counsel stated that defendant also preferred not to call the complainant's mother as a witness, and defendant personally confirmed on the record that that was his position.

In neither his motion to remand nor in his brief on appeal has defendant provided an affidavit or other offer of proof about the content of the complainant's mother's potential testimony. Therefore, defendant has not established the factual predicate of his claim or how the witness's testimony would have benefited the defense. *Douglas*, 496 Mich at 592. Defendant explains, however, that he raises this argument not to assert that the failure to call that witness was a lost opportunity, but rather to show that his trial counsel failed to conduct a sufficient investigation to enable an informed judgment about whether to call the complainant's mother as a witness.

Defendant's assertion is undermined by his need to show that his trial attorney's lack of preparation resulted in prejudice, which cannot be shown without some indicia of the content of the complainant's mother's potential testimony. Defendant does not show how defense counsel's investigation was unreasonable in light of counsel's explanation that he had been in touch with the mother's attorney throughout trial, but could not subpoena her because he could not locate her, and in light of the mother's attorney's own statement that she had advised her client not to testify. Further, as noted, defendant confirmed on the record that he did not want his trial counsel to call the complainant's mother as a witness.

B. SENTENCING

Defendant also contends that defense counsel failed to advocate effectively on his behalf at sentencing because he was unprepared. Defendant also asserts that, as a result of his trial counsel's ineffective assistance of counsel, his sentence was disproportionate, unreasonable, and based on inaccurate information. We disagree.

"To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals."

People v Clark, 315 Mich App 219, 223; 888 NW2d 309 (2016) (cleaned up). Defendant did not raise any of his sentencing issues in a motion below for resentencing, or in a motion in this Court to remand for that purpose. Therefore, defendant's arguments about his sentence are unpreserved. However, because defendant argues that his trial counsel rendered ineffective assistance of counsel for failing to raise these sentencing issues, we review such issues under the rubric of ineffective assistance of counsel. See *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006) ("[I]f the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel.").

"In reviewing a trial court's calculation of a defendant's sentencing guidelines score, this Court reviews factual determinations for clear error, and factual determinations must be supported by a preponderance of the evidence." *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). A sentencing court "may consider all record evidence, including the contents of a [presentence investigation report (PSIR)], plea admissions, and testimony presented at a preliminary examination." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Anderson*, 322 Mich App at 634 (cleaned up). Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Id*. at 392-393. "When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016).

At sentencing, the trial court asked whether it was proper for defendant's conviction of a particular Ohio misdemeanor to be included in the assessment of Prior Record Variable (PRV) 5, which addresses misdemeanor convictions. MCL 777.55. Defense counsel replied that he was unfamiliar with Ohio law. The trial court ultimately did not consider the Ohio misdemeanor in the scoring of PRV 5. After the parties concluded their arguments and amendments relating to the PSIR and the sentencing guidelines, the trial court asked defense counsel if he wanted to say anything on defendant's behalf, and counsel declined the offer. Likewise, defendant also did not address the court. Ultimately, the trial court imposed a minimum sentence at the low end of the guidelines range.

In his brief on appeal, defendant appears to argue that his counsel rendered ineffective assistance as a result of the scoring of PRV 5. However, defendant does not explain how he was prejudiced by his trial counsel's purported lack of preparation in connection with the scoring of PRV 5. In fact, because the trial court resolved this issue in defendant's favor by excluding the Ohio misdemeanor from consideration, defendant has not suffered any prejudice.

Defendant otherwise contends that with more vigorous advocacy from defense counsel the trial court would have departed downward from the recommended sentencing range. Defendant asserts that his PSIR included details about the struggles he faced in his personal life and that defense counsel should have raised those details as mitigating factors. Similarly, defendant argues that defense counsel should have begun a discussion with the trial court about how defendant's criminal history should be carefully weighed in acknowledgment of the effects of implicit biases against minorities.

We conclude from the record that defendant was not denied effective assistance of counsel during sentencing. We acknowledge it is highly unusual for defense counsel to offer no allocution at a sentencing hearing. Nonetheless, we cannot discern the impact that counsel's silence may have had on defendant's sentence, and we decline the invitation to speculate. Defendant has not established that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's alleged errors, there is a reasonable probability that the proceedings would have been different. *Trakhtenberg*, 493 Mich at 51. While defendant speculates that a different strategy may have resulted in a downward departure sentence, speculation is not sufficient to demonstrate prejudice. *Avant*, 235 Mich App at 508.

Defendant also asserts that his trial counsel's lack of advocacy ensured that the trial court's understanding of his PSIR was incomplete, and, therefore, inaccurate. "A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *Francisco*, 474 Mich at 88. The record reflects that the trial court considered the PSIR at sentencing, and that defendant, who was under oath, agreed that the information contained therein was accurate with the only exception being the amount of jail credit. Defendant does not explain why, or cite authority for the proposition that, courtroom advocacy about the contents of the PSIR is necessary to enable a trial court to gain a complete understanding of it. "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). Therefore, defendant has abandoned this contention by failing to adequately brief it.

Additionally, in the context of defendant's ineffective assistance of counsel claim, he argues, in cursory fashion, that his sentence is disproportionate, unreasonable, and based on inaccurate information. But defendant did not raise this issue in the statement of questions presented, and thus has failed properly to present it for this Court's consideration. See *Unger*, 278 Mich App at 262; MCR 7.212(C)(5). Alternatively, defendant's argument about the proportionality of his sentence, or the accuracy of the information relied upon, does not bring error to light. Defendant's unsupported contention that further advocacy was required for the trial court to have a complete understanding of his PSIR is the only argument defendant has properly raised concerning the accuracy of information used in sentencing. Defendant otherwise fails to address why his sentence within guidelines was disproportionate or identify what information, if any, is inaccurate.

A "sentence within the Legislature's guidelines range is presumptively proportionate." *People v Odom*, 327 Mich App 297, 315; 933 NW2d 719 (2019). "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). For these reasons, defendant fails to show that his sentence

was based on inaccurate information, or to overcome the presumption that his sentence was proportionate.

Defendant renews his request that this Court remand this case to the trial court for further development of the factual record to support his claims of ineffective assistance of counsel as an alternative to granting relief on the basis of the record available. MCR 7.211(C)(1)(a)(ii) provides that a motion to remand for the development of a factual record "must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." A motion for a remand is properly denied where the defendant "has not set forth any additional facts that would require development of a record to determine if defense counsel was ineffective . . . ." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Because defendant had not attached supporting affidavits or other offers of proof in support of his motion, he has not identified any factual issues that would require further development of the record. Further, defendant waived any PSIR inaccuracies under oath prior to sentencing. Therefore, defendant has failed to show that such a remand is appropriate, and we again deny his request.

Affirmed.

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica