STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2011
v	No. 285480 Wayne Circuit Court
MIGUEL MONTANEZ, Defendant-Appellant.	LC No. 07-014315-FH

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant engaged in a 15-month course of escalating sexual abuse against the minor daughter of his live-in girlfriend. For this conduct, a jury convicted defendant of a single count of second-degree criminal sexual conduct (CSC-2), MCL 750.520c(1)(a) (victim under 13), and the court imposed a ten-month to 15-year term of imprisonment. Defendant raises several challenges to his conviction and sentence, all of which lack merit. However, this Court previously remanded to the trial court for a *Ginther*[1] hearing. The trial court determined that defendant had received ineffective assistance of counsel and granted a new trial. Because a new trial is not warranted and the trial court exceeded the scope of this Court's order on remand, we vacate the trial court's order in this regard.

The facts of this case are short and straightforward. The victim, MI, alleged that defendant began touching her in a sexual manner in April 2006, when she was 11 years old. Defendant initially touched only MI's shoulders and thighs. As time went on, defendant began touching MI's breasts, buttocks and vaginal area. In September 2006, defendant started touching MI more frequently and for longer durations. He sometimes walked naked into her bedroom. Finally, on July 9, 2007, (the "July 9" incident), defendant came into MI's bedroom while he was naked and then left. Shortly thereafter, defendant approached MI in the hallway and asked her if she wanted a swimming pool. MI answered affirmatively and defendant instructed MI to show

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

her breasts in exchange. MI locked herself in her bedroom and subsequently told her mother, LF,[2] about the abuse.

I. REQUEST FOR ADJOURNMENT AND NEW TRIAL

Defendant first argues that the trial court abused its discretion in denying his request for new counsel and his implicit request to adjourn the proceedings on the first day of trial. This Court reviews for an abuse of discretion a trial court's decision affecting a defendant's right to counsel of choice and a court's denial of a request to adjourn. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). To the extent that defendant's argument implicates his constitutional rights, our review is de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

On the first day of trial, defense counsel informed the trial court that defendant "would like to have another attorney." The trial court established that defendant had retained counsel, and dismissed defendant's request for "another attorney" without elaboration. The prosecutor then placed on the record the details of a plea offer, and the trial court inquired of defendant whether he wished to accept or reject the offer. The following colloquy ensued:

> *The Court*. That offer? Yes or no?
>
> *[Defendant]*. Yes.
>
> *The Court*. Any questions about it?
>
> *[Defendant]*. Can I talk to you privately?
>
> *The Court*. Talk to me privately?
>
> *[Defendant]*. Yes.
>
> *The Court*. No.
>
> *[Defendant]*. No?
>
> *The Court*. Can't do [] that. You can't talk to me in private.
>
> *[Defendant]*. I guess I need another attorney.
>
> *The Court*. No. This is the day of trial. This is the day of trial. So you hired the attorney, which I understand. But no, no, no. It's the day of

[2] To protect the identity of the minor victim, we will refer to the victim and her natural parents by their initials.

trial. This is the trial date. We got the jury in the hall. We're ready to go to trial or to plea, but you can't talk to me in private, anymore than the victim could talk to me in private. That can't happen. That's just not allowed, for obvious reasons. So –

[Defense Counsel]. Well, your Honor, if I could just make a record that obviously there is a breakdown in the attorney/client relationship. This is a criminal trial, and he does have the right to have an attorney of his choice. And since –

The Court. I'm unfamiliar with that rule. So you see, the problem is you've changed the law. The law says he has a right to have an attorney. He can choose an attorney. If he can't afford an attorney I'd appoint an attorney for him. Or he can represent himself. Those are his three options. He does not have a right [sic] a attorney of his choice. That's a misstatement of the law. But he chose the attorney. Apparently the attorney conveyed the offer and he doesn't like the offer. He wants to set his own standard and his own perimeters like many defendants do, and that's not acceptable. And he doesn't like it, so now his attitude is the problem is you; you're out. Is that an unfair assessment of what going on? Yes or no?

[Defense Counsel]. I think it's a fair assessment.

The Court. Right. That's exactly what's going on. He can take the offer, or he can go to trial. The jury has been in the hall. You guys have asked me for time. Trial is schedule [sic] for 8:30. It's now 11:05. I've given everybody more than enough time. It's unfortunate that he wants to dictate what he wants to dictate. But that's why he hired you, 'cause you're an experienced attorney and you know what you're doing, and you know what goes on. He doesn't have to like what you tell him. He doesn't have to appreciate it. But dumping you and saying I'm going to get somebody else on the morning of trial, when the jury's in the hall, is too late in the game to do that. Everybody's ready for trial. We're going to trial, or unless he takes the offer. And the offer is a generous offer. That's up to him. I don't know anything about the case. But no, he cannot talk to me in private. That's unacceptable. And no, you cannot change attorneys when we're ready to start the trial, simply because you communicated an offer to him that he apparently is unhappy with.

Anything else? Anything else?

[Defense Counsel] Just that I am ready for trial, so I just want the record to note that.

The Sixth Amendment affords a defendant who does not require appointed counsel the right to choose who will represent him. *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692;

100 L Ed 2d 140 (1988). But the prompt and efficient administration of the courts may sometimes temper a defendant's constitutionally protected right to counsel of choice. *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). "[T]he Constitution does not afford an accused, who has ample time to obtain counsel, the 'unbridled right' to insist that his trial be held in abeyance while he replaces one competent attorney with another." *United States v Bragan*, 499 F2d 1376 (CA 4, 1974). The denial of a continuance to retain counsel rises to the level of a constitutional violation when there is an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' . . . ." *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983), quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964). Whether a court's denial of an adjournment is so arbitrary as to violate due process "must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar*, 376 US at 589. Trial courts are entitled to exercise "broad discretion" when ruling on requests for adjournments, *Morris*, supra at 11, and if a court chooses a result that falls within the range of reasonable and principled outcomes, it does not abuse its discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

When reviewing the denial of a defendant's motion for a continuance to substitute counsel, this Court considers five factors:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right; (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).][3]

The trial court did not deny defendant's right to counsel by refusing to adjourn the trial. Defendant did not request a new attorney until the morning of trial, at which point the jury was assembled and waiting, the prosecution witnesses were present, and defense counsel was prepared to try the case. An adjournment would have compromised the public's interest in the prompt and efficient administration of justice and defendant was negligent in postponing his motion until that time. See *Akins*, 259 Mich App at 557.[4]

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[3] In *Gonzalez-Lopez*, 548 US at 150-152, the United States Supreme Court held that the erroneous deprivation of the right to counsel of choice is a structural error that is not subject to harmless-error analysis. Because the prejudice factor listed in *Echevarria* is not critical here, we need not consider whether that factor is inconsistent with the holding in *Gonzalez-Lopez*.

[4] Defendant's affidavit attached to his appellate brief blames defense counsel for waiting until the morning of trial to notify the court that defendant wanted a new attorney. The affidavit is inconsistent with defendant's testimony at the *Ginther* hearing. In his affidavit, defendant states that defense counsel informed him of a plea offer "[s]hortly before the trial" and that "I was so upset that [defense counsel] pressured me to take this 'deal' that I told her that I wanted to

In any event, defendant did not express a legitimate reason to merit a delay to secure replacement counsel. *Echavarria*, 233 Mich App at 369. Defense counsel asserted in conclusory terms that the attorney-client relationship had broken down and defendant stated simply that he needed another attorney. Defense counsel later agreed with the trial court that defendant was merely dissatisfied with the plea offer and defendant did not disagree on the record. Defendant now claims that he was unaware that he was permitted to speak and felt intimidated in court. Yet, defendant had already spoken in the courtroom when he asked to talk to the judge privately and stated that he needed another attorney. Defendant's affidavit asserts that he wanted a new attorney because defense counsel had failed to prepare for trial in various ways, but defendant did not raise that concern in the trial court. Accordingly, we conclude that defendant was not denied his constitutional right to counsel of choice and the trial court acted within its discretion in denying defendant's implicit request for an adjournment.

II. ADMISSION OF HEARSAY STATEMENTS

Defendant challenges the trial court's admission, through the testimony of LF and Detroit Police Officer Rosemary Coleman, of hearsay statements made by MI. Defendant also challenges the court's admission of hearsay statements regarding a police dispatch radio transmission ("the radio run" evidence) through the testimony of Coleman and her partner Edward Thomas. Defendant contends that the challenged statements were inadmissible and violated his constitutional right to confront the witnesses against him. We generally review a trial court's evidentiary rulings for an abuse of discretion and constitutional claims de novo. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009). However, defendant failed to preserve his challenges by raising a contemporaneous objection on the same grounds asserted on appeal. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To merit relief, defendant must show that the plain error "affected the outcome of the lower court proceedings," "resulted in the conviction of an actually innocent defendant," or otherwise seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 763.

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discharge her as my attorney and get a new attorney." Defendant's affidavit continues: "[Defense counsel] did nothing to remove herself as my attorney and did nothing to notify the judge in advance of the day of trial that I wanted to get another attorney. However [sic], [defense counsel] did not notify [the trial court] that I wanted a new attorney until the morning of trial on January 10, 2008." The implication is that defendant learned of the plea negotiations on an unspecified date shortly before the first day of trial and told counsel on that date that he wanted to discharge her, but that counsel waited until the morning of trial to communicate defendant's request to the court. At the *Ginther* hearing, however, defendant testified that he first heard about the plea negotiations on the first day of trial and he told defense counsel that he would not accept a plea and wanted a different lawyer. Defendant also testified at the hearing that he did not conclude until the first day of trial that defense counsel was unprepared. This inconsistency undermines defendant's effort to shift the blame to defense counsel for the delay in informing the trial court of defendant's request for a new attorney.

Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Under MRE 802, hearsay is generally inadmissible. *People v Yost*, 278 Mich App 341, 363; 749 NW2d 753 (2008). MRE 803(2) provides an exception for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "A statement is admissible under this exception if (1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event." *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). The rationale for this exception is that "a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. "The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate." *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003). Whether a statement made in response to questioning qualifies as an excited utterance "depends on the circumstances of the questioning and whether it appears that the statement was the result of reflective thought." *Smith*, 456 Mich at 553.

The statements of 12-year-old MI to LF and Coleman were admissible as excited utterances. MI faced a startling event shortly before making her statements. Defendant walked into MI's bedroom naked, and then asked her if she wanted a swimming pool in exchange for showing him her breasts. Such statements and conduct directed toward a 12-year-old child are startling. Moreover, MI was under the stress of excitement caused by the startling event when she made the statements. Following this incident, MI locked herself in her bedroom and cried, later expressing her fear that defendant was planning to rape her. MI was still crying when LF found her. LF testified that MI's face and eyes were red from crying and that she was so upset she could not talk. MI was visibly shaken and crying when she told LF that defendant had been touching her in a sexual manner. When the police arrived later that morning, MI was still shaking, crying and could barely talk. Nothing in the record indicates that the questions asked of MI were so unduly suggestive or persistent that her responses could not have resulted from the stress of the startling event. See *Smith*, 456 Mich at 553-554.

Although MI's July 9 statements included references to sexual acts that occurred on earlier dates, those statements were still admissible as excited utterances occurring during the aftermath of the startling event. It is reasonable to conclude that MI's "excited utterance" would include references to the continuing pattern of abuse that she had suffered. Considering the circumstances, including MI's age, her relationship to defendant, the duration of the abuse, and the short span of time between the startling event and MI's disclosure, the trial court did not abuse its discretion in admitting the statements. See *Layher*, 238 Mich App at 584.

Defendant's right to confront MI was also not violated. "A defendant has the right to be confronted with the witnesses against him or her." *Yost*, 278 Mich App at 369, citing US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006),

citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, if the declarant "appears for cross-examination at trial," there is no confrontation violation and the statements are admissible. *Walker*, 273 Mich App at 59 n 9. MI testified at trial and defendant actually cross-examined her. Accordingly, the Confrontation Clause did not prohibit the admission of her prior statements.[5]

We also reject defendant's challenges to the admission of the radio run evidence. We note that "[t]here is no exception to the hearsay rules for statements transmitted by a police radio." *People v Eady*, 409 Mich 356, 361; 294 NW2d 202 (1980). Yet, "there are instances in which evidence of statements transmitted over the radio is offered for purposes other than to prove the truth of the matter asserted" and therefore are not hearsay. *Id*. See also *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) ("[A] statement offered to show why police officers acted as they did is not hearsay."); *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988) (holding that the police dispatcher's statement was offered to prove why the responding officers acted in a certain manner, not to prove the truth of the matter asserted).

Coleman and Thomas briefly testified about the radio run directing their response at MI's home. Coleman described the radio run as "[b]oyfriend assaulted the girlfriend's daughter." Thomas testified that "[t]he nature of the run was a possible molesting." Each officer then testified about going to MI's home in response to the radio run. The testimony clearly was not offered to prove the truth of the matter asserted but to show why the officers acted as they did. Accordingly, the statements were not hearsay.

Moreover, "the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 10-11 (citations omitted). See also *Crawford*, 541 US at 59 n 9 (explaining that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"). As the radio run evidence was offered simply to show why the officers went to MI's home, its admission did not violate defendant's right of confrontation. *Chambers*, 277 Mich App at 11.

III. EXCLUSION OF CELL PHONE BILL

Defendant challenges the trial court's exclusion of a cell phone bill showing recent calls between MI and her father, JI. Defendant asserts that the evidence was necessary to establish his defense that MI and LF colluded to falsely accuse defendant of CSC as revenge for defendant's stated intent to report JI to the authorities for dating a 13-year-old girl. Accordingly, defendant claims that the trial court's error in excluding the evidence violated his constitutional right to present a defense. Defendant preserved his evidentiary challenge by presenting the cell phone bill to the court and arguing for its admission. MRE 103(a)(2); *People v Grant*, 445 Mich 535,

[5] Because the Confrontation Clause placed no constraints on the use of MI's prior statements in light of her availability for cross-examination at trial, it is unnecessary to consider whether the prior statements were testimonial under *Crawford*.

545-546; 520 NW2d 123 (1994). As such, we may review the court's evidentiary ruling for an abuse of discretion. *Breeding*, 284 Mich App at 479. Defendant did not raise his constitutional challenge in the trial court and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

"Although the right to present a defense is a fundamental element of due process, it is not an absolute right," and the defendant "must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1985) (internal quotation omitted). This includes the rule that evidence can only be admitted if it is relevant to a material issue. Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Here, MI's cell phone bill had no relevance to the contested issue. Defendant wanted to show that MI warned JI about defendant's intent to report JI to the police. Accordingly, the *content* of the calls would have been relevant. The cell phone records could only show the *existence* of the calls and there is no indication that the mere existence of telephone conversations between MI and her father tended to establish a plot against defendant. Further, defendant presented no evidence that MI was even aware of defendant's intent to report JI to the police. Defendant admitted that he did not know whether MI had overheard the argument between defendant and LF regarding this issue. The cell phone bill, therefore, does not tend to establish that MI fabricated her claim against defendant to protect JI and is irrelevant to establish defendant's claimed defense. Accordingly, the trial court's decision to exclude this evidence fell within the range of principled outcomes. Compare *People v Armstrong*, ___ Mich ___; ___ NW2d ___ (Docket No. 142762, filed October 26, 2011), slip op at 10 (noting the significance of the complainant's cell phone records where the complainant denied contacting the defendant and testified "that she had absolutely no wish to call or speak to defendant after having undergone such a harrowing experience").

IV. JURY REQUEST FOR TRANSCRIPTS

Defendant contends that the trial court improperly berated the jury for requesting a transcript of Coleman's testimony and abused its discretion in denying the jury's request. Generally, a trial court's decision regarding a deliberating jury's request to reread testimony is reviewed for an abuse of discretion. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). Defendant's current challenge is unpreserved for appellate review as defense counsel stated that she had no objection to the court's instruction. See *Carines*, 460 Mich at 767. Accordingly, our review is limited to plain error affecting substantial rights. *Id.* at 763-764.

MCR 6.414(J) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so

> long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Although trial transcripts often are prepared well after trial, the court should not instruct the jury in a manner that forecloses the possibility of later reviewing the requested testimony by other means, such as by having the court reporter read back the testimony. *Carter*, 462 Mich at 213 n 10. See also *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996) (holding that the trial court acted within its discretion in refusing to provide the jury with a transcript of a witness's preliminary examination testimony that had not been admitted into evidence where the court left open the possibility of having the witness's trial testimony reread later).

Here, the trial court did not abuse its discretion in refusing to provide the jury with the transcript of Coleman's testimony. The requested transcript had not yet been prepared and the jury had already requested and been provided with two other transcripts since beginning deliberations the day before. The court specifically told the jury that the court reporter could read back the testimony, stating: "You tell me what it is you want and my court reporter will find it, and she'll read it back. If you want the whole police officer's testimony read back she'll read it back. . . ." Although the court's comments reflected frustration with the jury's request for a third transcript, the court expressed no reluctance about having any testimony reread to the jury, and the jurors indicated that the court's explanation answered their question.

V. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor engaged in misconduct by making several improper comments in closing argument. Generally, "[i]ssues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465; 802 NW2d 627 (Docket No. 286960, issued November 2, 2010) (slip op at 5). "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *Id.* Defendant did not object to the portions of the closing argument challenged on appeal or request a curative instruction. Accordingly, our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). This Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329-330.

"When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* at 330. "A prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). A prosecutor may, however, argue from the facts that a witness should be believed. *Id.* "A prosecutor may argue that a prosecution witness is credible." *Id.* at 633. "In addition, a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Callon*, 256 Mich App at 330. A prosecutor's remarks that are otherwise improper may not require reversal if they are responsive to issues raised by the defense. *Id.*

Defendant challenges the following comment by the prosecutor in rebuttal closing argument regarding MI's credibility:

> Now is it possible she made it all up? I mean, is it humanly possible that a twelve year old could make it all up? Well possibly, sure. But have you [sic] to decide is it possible that this twelve year old girl, the one that you saw [on] this stand made it all up. And I think when you use your reason and common sense that doesn't make any sense at all. It's clearly not true.

This comment was responsive to the defense theory that MI fabricated the allegations against defendant. Moreover, the prosecutor did not vouch for MI's credibility by suggesting that he had special knowledge regarding her truthfulness. Instead, the prosecutor argued from the evidence that it did not make sense to suggest that MI fabricated the allegations. In particular, the prosecutor highlighted testimony that MI had a closer relationship with defendant than with JI and that MI and LF were visibly shaken and upset when the police came to their home. Therefore, when considered in context, the prosecutor's argument that MI should be believed did not deny defendant a fair and impartial trial.

Defendant challenges the prosecutor's comment regarding defendant's testimony that he told LF that he would report JI to the police:

> Guess what? You know if I'd been charged with rape, they said I been molesting this little girl, she made it up because of her dad, and her dad was molesting another kid, and I had friends who were cops, but I never told them. I never told anybody.
>
> You really only can use that to determine whether or not you believe [defendant] on the other stuff that he said when he's on the stand.

This comment regarding defendant's credibility was a reasonable argument from the evidence. *Callon*, 256 Mich App at 330. Defendant testified that he told LF that he would inform his friends, who were police officers, about JI's alleged conduct, but defendant admitted on cross-examination that he never reported the matter to the police. In light of this evidence, it was fair to question why, after having been "falsely" accused of abusing MI, defendant did not report JI to the police. "[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Defendant next challenges the prosecutor's argument regarding defendant's escalating behavior directed at MI:

> This was part of a scheme that didn't begin until after she turned eleven, after her birthday. It was going to continue. And probably that next birthday was when he was going to take it to the next step. Take it to the next level.
>
> [*Defense counsel*]: Your Honor.
>
> *The Court*: Well, can we —

[*The prosecutor*]: I'll move on, Judge. I apologize.

Although a prosecutor is prohibited from making a statement of fact to the jury that is not supported by the evidence, the prosecutor "is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). While no direct evidence exists that defendant planned to "take it to the next step" on MI's next birthday, the evidence of defendant's escalating behavior directed at MI supports a reasonable inference that he would have continued this pattern. Defendant began his abuse in April 2006 by touching MI's shoulders and thighs, later moving on to her breasts, buttocks, and vaginal area and then increasing the frequency and duration of the contacts. After the July 9 incident, MI feared that defendant would further escalate his conduct and rape her. This evidence supports the conclusion that defendant was engaged in an escalating scheme of sexual abuse against MI.[6] Accordingly, the prosecutor's challenged argument was based on a reasonable inference from the evidence.[7]

VI. ASSISTANCE OF COUNSEL

Defendant continues to contend that he was denied the effective assistance of counsel in several respects. This Court remanded to the trial court for a *Ginther* hearing[8] at which many of defendant's current challenges were considered and those issues are properly preserved for our review. See *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To the extent that defendant now raises additional claims, our review is necessarily limited to mistakes apparent on the existing record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

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[6] The prosecutor discussed this evidence in the portion of his argument immediately preceding the section that defendant quotes:

> From April of 2006 until July of 2007 [defendant] was engaged in escalating behavior of sexual contact. He started by rubbing the shoulders and the thighs, then he moved to the buttocks, then he moved to the breast, later he moved to the vaginal area. It started happening more frequently. The amount of time he would do it was more. He was building up to something more. He was building up to something more. But luckily [MI] came forward and said, no, this has been happening — or actually even worse — even more miraculous, she didn't actually come forward unless she was pressed. [LF] caught her crying and then it came out.

[7] To the extent that any of the prosecutor's comments could be deemed improper, any potential prejudice was dispelled by the court's instruction to the jury that the attorneys' arguments were not evidence. *Callon*, 256 Mich App at 330-331. "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[8] *People v Montanez*, unpublished order of the Court of Appeals, entered June 18, 2009 (Docket No. 285480).

"A claim of ineffective assistance of counsel is a mixed question of law and fact." *Petri*, 279 Mich App at 410. This Court reviews any findings of fact for clear error, but the ultimate constitutional issue arising from an ineffective assistance claim is reviewed de novo. *Id*. See also *Armstrong*, ___ Mich at ___, slip op at 7-8. Resolution of this issue also requires consideration of whether the trial court's order granting defendant a new trial exceeded the scope of this Court's remand order. Whether the trial court exceeded the scope of this Court's remand order is a question of law, which is reviewed de novo. See generally, *People v Hawthorne*, 474 Mich 174, 179; 713 NW2d 724 (2006).

The trial court did exceed the scope of this Court's remand order when it granted defendant a new trial. This Court remanded the case "to the trial court for an evidentiary hearing and decision whether defendant-appellant was denied the effective assistance of counsel or should otherwise be granted a new trial." *Montanez, id.* This Court retained jurisdiction, limited the proceedings on remand to the issues raised in the remand motion, and directed the trial court to "make findings of fact and a determination on the record." *Id*.

The trial court was understandably confused by this Court's directive to consider whether defendant "should otherwise be granted a new trial." However, in similar circumstances, the Supreme Court held that the trial court's grant of a new trial on remand exceeded the scope of this Court's order:

> In lieu of granting leave to appeal, that part of the . . . order of the Oakland Circuit Court granting defendant a new trial is vacated, and the case is remanded to the Court of Appeals for consideration as part of defendant's claim of appeal . . . . The circuit court's decision to grant defendant a new trial exceeded the scope of the Court of Appeals remand order. Because the Court of Appeals retained jurisdiction when it granted defendant's motion to remand, the Court [of Appeals] should review as part of defendant's claim of appeal the trial court's conclusion following the evidentiary hearing that defendant was denied the effective assistance of counsel. [*People v Smith*, 464 Mich 876; 630 NW2d 625 (2001).]

As in *Smith*, the trial court here exceeded the scope of this Court's remand order by granting defendant a new trial. Although the trial court was directed to make findings of fact and a determination on the record, this Court retained jurisdiction. Accordingly, we vacate the trial court's order granting defendant a new trial and decide as part of defendant's claim of appeal whether defendant was denied the effective assistance of counsel. *Id*.

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for trial counsel's errors." *Ackerman*, 257 Mich App at 455. "Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Petri*, 279 Mich App at 411. This Court does not substitute its judgment for that of counsel regarding strategic matters, nor does it assess counsel's performance with the benefit of hindsight. *Id.* See also *Armstrong*, ___ Mich at ___, slip op at 8.

Defendant first contends that defense counsel was ineffective in failing to object to the prosecutor's leading questions of MI on direct examination. "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness'[s] testimony." MRE 611(d)(1). "[A] considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). A defense counsel's failure to object to leading questions, however, may be part of her trial strategy. *Unger*, 278 Mich App at 242. Here, defense counsel may reasonably have determined that lodging a string of objections to the prosecutor's method of examining MI, a 12-year-old girl, would have engendered jury sympathy for her. Defense counsel may also have concluded the leading questions were used "only to the extent necessary to develop [MI's] testimony." *Watson*, 245 Mich App at 587. Failure to raise a futile objection does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). In addition, defendant has not demonstrated that he was prejudiced by the leading questions. *Watson*, 245 Mich App at 587-588.

Defendant argues that counsel was ineffective in failing to object to (1) the prosecutor's elicitation of MI's hearsay statements, (2) the "radio run" evidence, (3) the trial court's instruction to the jury following its request for a transcript, and (4) the prosecutor's closing argument. As discussed, however, defendant's arguments regarding these issues lack merit and any objections would have been futile. See *Ericksen*, 288 Mich App at 201.

Further, defense counsel was not ineffective for failing to move for a mistrial regarding the trial court's instruction to the jury following its request for Coleman's testimony transcript. "A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant 'and impairs his ability to get a fair trial.'" *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009), quoting *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Because the trial court specifically informed the jury that the court reporter could read any testimony that the jury wished to rehear, defendant has not established that the court's instruction was erroneous or that any irregularity impaired his right to a fair trial.

Defendant asserts that defense counsel was ineffective for failing to object to or move to strike (1) testimony by LF that she and MI would not "have been here today to tell you about it" if LF had confronted defendant about the allegations, and (2) testimony by LF that she believed MI's allegations. Given the isolated and passing nature of the challenged comments, defense counsel may have concluded that it was better not to draw further attention to them. Also, after LF volunteered that she and MI might not be here today if LF had confronted defendant, the prosecutor stated, "Let's not talk about that. You don't know because that didn't happen, right?" LF agreed and the prosecutor stated, "So let's just talk about what you saw, what you heard." In light of the prosecutor's appropriate response, any further objection or motion to strike would be unnecessary. Defense counsel also may have reasonably believed that moving to strike LF's statement that she believed MI's allegations would not have gone over well with the jury.

Defendant also argues that defense counsel should have objected to the testimony of the officer-in-charge that one of his duties is to interview defendants. In response to the prosecutor's question regarding the role of the officer-in-charge, the witness answered, "To basically conduct the investigation of the case, interview witnesses, defendants, if possible." Outside the presence of the jury, defense counsel stated that no curative instruction was necessary. The court agreed,

stating "Don't call attention to it is a perfectly legitimate response." We agree that defense counsel made a reasonable strategic choice not to draw attention to this stray remark.

Defendant challenges defense counsel's failure to impeach MI with a police report stating that the July 9 incident occurred at 9:00 a.m., rather than at 7:00 a.m. as she told a different investigator. However, MI did not sign the police report or otherwise adopt the officer's recordation of MI's statements as an accurate account. Nonetheless, defense counsel cross-examined MI regarding this point:

> *Q.* Do you recall telling the Kids Talk person that this happened at seven in the morning?
>
> *A.* I don't remember that.
>
> *Q.* Okay. Do you remember telling the doctor it happened at seven in the morning?
>
> *A.* No, I don't remember either.
>
> *Q.* Do you remember telling the officer the day of July the 9th that it happened at nine in the morning?
>
> *A.* I don't remember that either.

Because defense counsel cross-examined MI regarding the time discrepancy, any use of the police report for impeachment would have been merely cumulative. Defendant thus has not established a reasonable probability that the outcome of the trial would have been different. *Ackerman*, 257 Mich App at 455.

Defendant challenges counsel's failure to question defendant on direct examination regarding his 10:00 a.m. doctor appointment on July 9, for which he left the house at 8:45 a.m., and counsel's failure to move to admit the doctor's scheduling notice confirming defendant's appointment time. The parties stipulated that defendant arrived at his medical appointment in Southfield at 9:50 a.m. Further, defendant testified that he woke up around 8:15 a.m. and did not see MI before leaving the house. In light of this stipulation and evidence presented to the jury regarding defendant's activities that morning, defendant has failed to establish a reasonable probability that further evidence would have led to a different outcome at trial. *Id.*

Defendant also challenges counsel's failure to investigate the case and to produce material defense witnesses and evidence. Defendant contends that he asked his counsel to obtain physical evidence that has since been destroyed, including a 911 tape in which LF reported MI's allegations and Verizon text messages allegedly showing that LF was having an affair with another man. In addition, defendant argues that MI's friend to whom she first disclosed the abuse should have been called as a witness and has since moved and cannot be located.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "[T]he

failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id*. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has not established a reasonable probability that introduction of the 911 tape might have made a difference in the outcome of the trial. Defendant's affidavit asserts that he asked defense counsel to obtain a copy of the 911 recording because he believed "that the contents of it would help in my defense." Yet, defendant never described the contents of the tape that could have assisted his defense. And, at the *Ginther* hearing, defendant testified that he asked defense counsel to obtain the 911 tape because he knew from his phone records that LF had not called 911. This testimony obviously differs from defendant's assertion in his affidavit that the contents of the now-destroyed 911 tape would have helped his defense. Defense counsel testified on remand that she did not recall any discussion with defendant regarding the existence of a 911 tape. Given the lack of evidence regarding the existence of a 911 tape or its potential contents, and given defendant's inconsistent explanations, we cannot conclude that counsel's failure to investigate or produce such evidence deprived defendant of a substantial defense.

Regarding the text messages, defendant asserts in his affidavit that he gave defense counsel phone records showing that LF had sent text messages to a specific telephone number. Defendant claims that when he called this number, an unknown man answered. According to defendant, he asked defense counsel to subpoena the text messages to prove that LF was having an affair, thereby providing another motive for LF and MI to fabricate the allegations against him. Defendant further states that the text messages are no longer available because the time period during which Verizon preserves them has expired. Defense counsel testified that she does not recall defendant asking her to look for the text messages. Defendant has presented no proof regarding the contents of the text messages and, therefore, has not established that the text messages could have benefitted the defense. Thus, defendant has not met his burden of showing that the failure to obtain the text messages was objectively unreasonable or prejudicial.

We also reject defendant's challenge to counsel's decision not to call as a defense witness MI's friend to whom she first disclosed the sexual abuse. Defendant asserts in his affidavit that he was "confident" that the friend's testimony would have been "significantly inconsistent" with that of MI, but offered no evidence in support. Further, defense counsel testified on remand regarding her strategy:

> In my estimation, as the trial lawyer in the mist of the trial, there had been no corroboration. The prosecutor had not presented her as a corroborating witness. And I didn't believe that her testimony would have done anything to help. In fact, . . . it could have backfired and could have hurt him. And my job was to do everything I could to minimize any hurt that could have come to him.

Defense counsel further explained the difficulty in locating this witness:

> I didn't know how to get in touch with her mother. I reviewed the transcript of the preliminary exam, and I talked to [defendant] many, many times. He was at my office many times. He was also prepared for trial. Not just by me, but by

> somebody else who had been a chief trial attorney for the Defender's Office, for the Federal Defender's Office. We had many discussions of strategy and where we were going to go with this. And if it became apparent to me during . . . the time leading up to the trial, that . . . there was just the little girl, the complainant's testimony, and [defendant]. And [defendant] made a wonderful witness on his own behalf. . . . I thought that if we kept it minimal that it would be to his advantage in front of a jury. Because having tried cases for a long time, I know that things happen in trial that . . . you don't anticipate, and you tend to keep it as clean as possible to protect . . . the defendant. Determinations are made.

No basis exists to second-guess defense counsel's strategic decision against calling MI's friend in light of counsel's concern that doing so could have been detrimental to the defense. To the extent that defense counsel was deficient in failing to investigate or interview this potential witness, defendant has not described the content of her potential testimony or how it would have benefitted the defense. See *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002).

We further reject defendant's challenge to counsel's failure to call Francisco Espino as a witness. On remand, the trial court found that counsel erred in failing to call Espino because his testimony would have somewhat corroborated defendant's testimony, which could have affected the outcome in such a closely contested case. Defendant asserts in his affidavit that he told defense counsel that he left home early on July 9, to pick up a letter at Espino's house in Royal Oak and that he asked counsel to contact Espino. Defendant also testified at the *Ginther* hearing that he gave Espino's address and phone number to defense counsel. Defense counsel testified that her notes indicate that defendant was in Royal Oak at 11:30 a.m. on July 9, a fact she could only have obtained from defendant. Espino testified that he thought defendant arrived at his house at around 10:00 a.m. Defense counsel did not follow up on this information because defendant did not arrive in Royal Oak until one to four hours after the July 9 incident occurred. Accordingly, defendant's whereabouts would not assist the defense. We agree. Accordingly, defendant has failed to overcome the presumption that defense counsel's decision not to call Espino was sound strategy. For the same reason, defendant has not demonstrated a reasonable probability that the outcome of the trial would have been different if Espino had testified.

Finally, defendant contends that defense counsel was ineffective for failing to call character witnesses. However, defendant has not identified any such witnesses or offered proof regarding their anticipated testimony. As such, defendant has not demonstrated that the failure to call character witnesses deprived him of a substantial defense.[9]

[9] Defendant asserts that, even if no single error requires reversal, the cumulative effect of the errors denied him a fair trial. However, "[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

VII. SENTENCING

Defendant argues that the trial court improperly scored 15 points for offense variable (OV) 10 (exploitation of a vulnerable victim), MCL 777.40. "[T]he application of statutory sentencing guidelines is reviewed de novo." *Waclawski*, 286 Mich App at 680. "The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score." *Id.* "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *McLaughlin*, 258 Mich App at 671. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

MCL 777.40(a) provides for an assessment of 15 points if "[p]redatory conduct was involved." "Predatory conduct" is defined as "pre-offense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The Michigan Supreme Court has provided a three-part test to determine whether conduct was predatory:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?
>
> If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).]

In *People v Huston*, 489 Mich 451, 468; 802 NW2d 261 (2011), the Supreme Court held:

> For a trial court to assess 15 points for OV 10, the defendant's preoffense conduct only has to be directed at "a victim," not any specific victim, and the victim does not have to be inherently vulnerable. Instead, a defendant's "predatory conduct," by that conduct alone (*eo ipso*), can create or enhance a victim's "vulnerability."

In *Steele*, 283 Mich App at 491, this Court found such preoffense conduct where "the victims testified about numerous sexual assaults going on for a very long time before disclosure." The defendant in *Steele* had engaged in "grooming," i.e., "less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact." *Id.* at 491-492. The defendant's grooming behavior was directed at specific victims who "suffered from a readily apparent susceptibility to injury and persuasion because of their tender age and [the defendant's] authority over them as a grandparent." *Id.* at 492. Finally, the grooming was done for the primary purpose of victimization:

> There was evidence that the purpose of grooming was to desensitize the victims to the impropriety of the sexual contact, in order to escalate it over time. By beginning with milder forms of sexual contact, and then progressing to more intense sexual contact and penetration, defendant demonstrated that his intent and purpose were to victimize the complainants. [*Id*.]

MI's testimony established that defendant engaged in numerous sexual assaults over a long period of time escalating from lesser to higher sexualized forms of contact. This evidence supports that defendant "engage[d] in conduct before the commission of the [convicted] offense." *Cannon*, 481 Mich at 162. Further, as in *Steele*, defendant's preoffense conduct may be characterized as "grooming" to desensitize MI to future sexual contact. And MI had a readily apparent susceptibility to injury or persuasion given her young age and defendant's status as her mother's longtime boyfriend with whom MI had lived since she was six years old. See *Cannon*, 481 Mich at 158 (listing a victim's youth, the existence of a domestic relationship, and the offender's abuse of his authority status as among the factors to be considered in deciding whether a victim was vulnerable).

Finally, there was evidence that defendant's grooming behavior was done for the purpose of victimization. As discussed, defendant began with milder forms of contact and then progressed to more serious and frequent acts of abuse. Defendant's escalating behavior reflected an intent and purpose to victimize MI. The trial court thus properly scored 15 points for OV 10.

Defendant also contends that the trial court violated the Sixth Amendment and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by scoring the sentencing guidelines on the basis of facts that were not submitted to the jury and proven beyond a reasonable doubt. The Michigan Supreme Court "has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme." *Ericksen*, 288 Mich App at 202, citing *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); and *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, defendant's challenge lacks merit.

Defendant's conviction and sentence is affirmed. The trial court's order granting defendant a new trial is vacated.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher