STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2011
v	No. 297224 Berrien Circuit Court
LON L. HAMPTON, Defendant-Appellant.	LC No. 2009-016004-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i). Defendant was sentenced to concurrent terms of 10 to 40 years' imprisonment for each count. For the reasons stated in this opinion, we affirm in part, vacate in part, and remand for correction of the judgment of sentence.

Defendant's convictions are the result of sexual conduct with the teenage daughter of his former fiancé. The victim testified that she first had sexual relations with defendant beginning in March 2009 when she was 14 years old. Defendant continued to have a sexual relationship with the victim until June 2009, when the victim revealed that she was sexually active during a physical examination and later admitted that she was involved with defendant. Defendant was arrested shortly after the victim's revelation. Defendant sent the victim a letter while he was in jail awaiting trial. The letter asked the victim to say "it never happened" and explained that she should tell the authorities that she was angry because she did not want her mother to be remarried. Defendant was charged with six counts of criminal sexual conduct, including penile-vaginal penetration, fellatio, and cunnilingus when the victim was 14 years old and the same three behaviors when the victim was 15 years old. Defendant now appeals his convictions.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to have him evaluated by an independent clinician, in light of his closed head injury and history of substance abuse, to determine if there was support for an insanity or temporary insanity defense.

Because no evidentiary hearing was held regarding defendant's ineffective assistance claims,[1] this Court's inquiry is limited to mistakes apparent on the record. *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant maintains that defense counsel should have arranged for an independent evaluation of his sanity pursuant to MCL 768.20a. MCL 768.20a(3) provides in pertinent part:

> The defendant may, at his or her own expense, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. If the defendant is indigent, the court may, upon showing of good cause, order that the county pay for an independent psychiatric evaluation.

Defendant does not acknowledge on appeal that a court-ordered forensic evaluation for criminal responsibility was performed and that defendant was found competent to stand trial. Defendant further does not explain why this evaluation was insufficient for defense counsel to determine whether an insanity defense was viable. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Further, "a heavy measure of deference" is afforded to counsel's strategic judgments made after reasonable investigation or pursuant to a reasonable decision that made certain investigations unnecessary. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003). The forensic evaluator's detailed findings did not support an insanity defense. Giving deference to defense counsel's strategic judgment and considering defendant's failure to explain why reliance on the forensic evaluation was not reasonable, we find that defendant was not denied the effective assistance of counsel. *Id.* at 521-522; *Hoag*, 460 Mich at 6.

Defendant argues that defense counsel was also ineffective for failing to challenge for cause three jurors who had been or knew someone who had been sexually assaulted,[2] and for failing to use peremptory challenges to remove the same three jurors in the event that a for cause

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[1] We note that defendant raises several additional claims of ineffective assistance in connection with other alleged errors that will be addressed *infra* in tandem with our consideration of the other claimed errors.

[2] Defendant also argued that the trial court erred in failing to sua sponte excuse the jurors for cause; however, because defense counsel expressed satisfaction with the seated jury, defendant has waived direct review of this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

challenge was unsuccessful. A criminal defendant has a right to be tried by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). A juror may be challenged for cause if he "is biased for or against a party or attorney" or "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." MCR 2.511(D)(2)-(3). Jurors are presumed to be impartial until they are shown to be otherwise. *Miller*, 482 Mich at 550. "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* (citation omitted). "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996).

In this case, upon thorough individual questioning by the trial court, each juror definitively stated that she could be fair to defendant, decide the case based solely on the evidence presented, and set aside any feelings of bias or sympathy. Given the jurors' decisive answers, any challenge for cause would not have been granted as it could not be said that there was "at least a reasonable doubt" that the jurors could not be impartial. *Miller*, 482 Mich at 550. Accordingly, defense counsel was not ineffective for failing to challenge the three jurors for cause because defense counsel is not ineffective for failing to make a meritless motion. *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009).

Also, "an attorney's decisions relating to the selection of jurors generally involve matters of trial strategy." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). The defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). Defendant has not overcome the presumption that counsel's actions constituted sound trial strategy, and thus, he has not established that defense counsel was ineffective. Further, defendant has not produced any evidence that the jurors were not impartial. Accordingly, defendant has not demonstrated that but for trial counsel's failure to have the jurors removed from the jury, the result of the proceedings would have been different.

II. ADMISSION OF DEFENDANT'S LETTER AS EVIDENCE

A letter defendant wrote to the victim was admitted into evidence during trial. The letter referenced a Bible passage in Deuteronomy, which was also admitted. Defense counsel consented to the admission of both; accordingly, defendant has waived any claim of error regarding their admission. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also claims that the prosecutor improperly questioned the victim about religion. Because this claim is unpreserved, we review the alleged error for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Defendant must show that an error occurred, the error was plain, and the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

A prosecutor may not inquire as to the religious beliefs or opinions of a witness, or into the effects of those beliefs or opinions on truthfulness. MCL 600.1436; MRE 610; *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). Here, the prosecutor's questions were not an attempt to reveal any witnesses' religious beliefs or opinions or their bearing on credibility. The questions were focused on determining why defendant referenced the Bible passage in his letter in the context in which he wrote it. The prosecutor's questions were properly constructed around the evidence, the specific wording of defendant's letter. Accordingly, defendant has not demonstrated plain error.

Because the prosecution's questions were proper, defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's reference to the Bible is without merit. Defense counsel is not ineffective for failing to raise a meritless objection. *Payne*, 285 Mich App at 191.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his convictions because it did not establish that he was a member of the same household as the victim.

We review a challenge to the sufficiency of the evidence de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 377-378. It is the role of the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

A defendant is guilty of first-degree criminal sexual conduct pursuant to the theory that the defendant and the victim were members of the same household if it is proved beyond a reasonable doubt that the defendant engaged in sexual penetration with another person and that the other person was at least 13 but less than 16 years old and the defendant was a member of the same household as the victim. MCL 750.520b(1)(b)(i); *People v Phillips*, 251 Mich App 100, 102; 649 NW2d 407 (2002). In *People v Garrison*, 128 Mich App 640, 646-647; 341 NW2d 170 (1983), this Court considered the meaning of the term "household" as it is used in MCL 750.520b, the criminal sexual conduct statute.[3] This Court stated:

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[3] Defendant relies on *Stadelmann v Glen Falls Ins Co of Glen Falls*, 5 Mich App 536; 147 NW2d 460 (1967), which defined "household" in the context of a homeowners' insurance policy. We rely on *Garrison* because the decision is more recent and involved interpretation of the term in the same statute at issue here. We note that the term's definition in *Garrison* is broader than in *Stadelmann*.

> In context, the legislative intent is to proscribe sexual penetration in those instances involving young persons and members of the same family group, bounded by the "household." . . . We believe the term "household" has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit. The "same household" provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure. [*Id*. (footnote omitted).]

In this case, the evidence does not support defendant's assertion that he was nothing more than a rent-paying tenant separate from the victim's household. Defendant lived with the victim and her family for many months. When he first moved into the victim's house, he was engaged to the victim's mother. Defendant voluntarily contributed financially to the household, helping to pay for rent and groceries, and also performed some maintenance, the supplies for which he paid for himself. There was no evidence that his monetary contributions were a condition of him living in the house. Also, when the victim's mother was at work, defendant cared for the victim and her sister. Further, defendant testified that he had a family relationship with the victim's mother and her children and identified himself as the head of the family. When viewed in the light most favorable to the prosecution, the evidence proves that defendant, the victim, and her family constituted a family unit living together under the same roof. Consequently, there was sufficient evidence that defendant was a member of the victim's household.

IV. JURY INSTRUCTIONS

Defendant argues that the jury should have been instructed on the definition of "household" as used in MCL 750.520b(1)(b)(i).

During trial, defendant did not object to the jury instructions or request that an instruction defining "household" be provided. Accordingly, we review the unpreserved alleged error for plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508. In this case defendant has not demonstrated plain error affecting his substantial rights. Defendant maintains that the jury should have been instructed on the meaning of the term "household" based on the definition of the term set forth in *Stadelmann v Glen Falls Ins Co of Glen Falls*, 5 Mich App 536; 147 NW2d 460 (1967). *Stadelmann* defined "household" in the context of a homeowners' insurance policy. We find that the trial court's failure to sua sponte instruct the jury on the definition of "household" as set forth in *Stadelmann* was not error.

The definition of "household" has been considered by this Court in the context of the CSC statute. In *Garrison*, 128 Mich App at 646, this Court explained that the "length of residency or the permanency of residence has little to do with the meaning of the word ["household"] as it is used in the statute." This Court went further and explained that "the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit." *Id.* In light of the meaning of "household" as used in the CSC statute, defendant cannot demonstrate that the failure to instruct

on the definition of "household" affected his substantial rights. There was no evidence presented during trial that would support the conclusion that defendant was not a member of the household. It was uncontested that defendant was engaged to the victim's mother and was living with her family. Defendant himself testified that he was a part of the family. Accordingly, any error regarding the failure to instruct the jury regarding the definition of "household" did not affect the outcome of the trial.

Similarly, we disagree with defendant's claim that defense counsel was ineffective for failing to request that the trial court instruct the jury on the definition of "household." Defendant maintains that defense counsel should have requested an instruction defining "household" as it was defined in *Stadelmann*. As discussed, *Stadelmann* did not consider the meaning of "household" as used in the CSC statute, and "household" was defined by this Court in the context of the CSC statute in *Garrison*, 128 Mich App at 341. Accordingly, the definition set forth in *Stadelmann* would not be an appropriate definition of the term to use as an instruction for the jury in the context of a CSC case. Because the instruction defendant argues should have been requested would not have been proper, defendant has failed to demonstrate defense counsel was ineffective for failing to request it. Defense counsel cannot be found ineffective for failure to raise a futile request. *Payne*, 285 Mich App at 191.

V. SENTENCING

Defendant raises numerous issues related to his sentencing, all of which are unpreserved. We review alleged error that is unpreserved for plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508.

Defendant first argues that the trial court should have specifically stated how his maximum sentences were calculated and how his minimum and maximum sentences were proportionate to the offense and offender. "A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). We must affirm a sentence within the recommended minimum sentence range unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791-792; 790 NW2d 340 (2010).

At sentencing, the trial court stated that it read the presentence investigation report (PSIR). The trial court acknowledged the significant harm that defendant's actions had on the victim, and considered defendant's possible mental health issues, the victim's mother's request for mercy, the nature of the offenses, and the sentencing purposes of protecting the public, deterrence, and punishment. The trial court sentenced defendant within the guidelines range of 81 to 135 months to a minimum of ten years in prison. It also acknowledged that it could sentence defendant to a maximum of life in prison, but instead sentenced him to a maximum term of 40 years in prison based on the above factors. Based on the trial court's remarks, we find that it sufficiently stated its reasons for the sentences it imposed.

Defendant also asserts that the trial court failed to consider his mental health status, remorsefulness, and strong family support as mitigating factors that supported a downward departure.[4] Defendant's argument has no merit. The trial court expressly stated that it considered defendant's possible mental health issues when it sentenced him below the probation officer's recommendation. Further, defendant did not express remorse at sentencing and there was no evidence of family support. Therefore, we find that the trial court did not plainly err in regard to the factors it considered in sentencing defendant. We affirm defendant's sentence because it is within the recommended minimum guidelines range and there is no evidence that the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *Jackson*, 487 Mich at 791-792.

Because we conclude that the trial court did not err in regard to the factors it considered when it sentenced defendant, we further find that defendant cannot establish defense counsel was ineffective for failing to raise these factors during sentencing. Defense counsel cannot be ineffective for failure to raise a meritless or futile issue. *Payne*, 285 Mich App at 191.

Defendant next argues that the trial court relied on inaccurate information when it sentenced him because his PSIR did not include an assessment under MCR 6.425(A)(5).[5] Defendant is entitled to be sentenced based on accurate information. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003). Contrary to what defendant asserts, the trial court was not required to order an assessment under MCR 6.425(A)(5). The PSIR noted defendant's mental health and substance abuse problems. Thus, it complied with MCR 6.425(A)(5). Additionally, although the PSIR did not contain defendant's forensic evaluation reports, the trial court was aware of their content when it sentenced defendant. Accordingly, defendant has not demonstrated plain error affecting his substantial rights.

Next defendant argues that his sentences constitute cruel and unusual punishment. Because defendant's prison sentences are within the applicable guidelines range, they are presumed proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A proportionate sentence is not cruel or unusual punishment. *Id*. Defendant presents nothing to support his contention that his sentences were excessive or constituted cruel and unusual punishment. Accordingly, defendant has not demonstrated plain error affecting his substantial rights and his sentences must be affirmed. *Jackson*, 487 Mich at 792.

Lastly, defendant argues that the holdings in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L

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[4] Defendant's reliance on the federal sentencing guidelines as support for a downward departure is misplaced because those guidelines are inapplicable in Michigan.

[5] Defendant was sentenced in 2010, at that time MCR 6.425(A)(5) provided that a presentence investigation report must include "the defendant's medical history, substance abuse history, if any, and if indicated, a current psychological or psychiatric report." The current version of MCR 6.425(A) contains the same requirement in MCR 6.425(A)(1)(e).

Ed 2d 403 (2004), should apply to Michigan's sentencing scheme. We disagree. Our Supreme Court has repeatedly held that these holdings do not affect Michigan's indeterminate sentencing scheme. See, e.g., *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 156, 162-164; 715 NW2d 778 (2006). Defendant's argument that *Drohan* was wrongly decided is unavailing. We are bound by the decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 271; 643 NW2d 253 (2002).

VI. ISSUES RAISED BY DEFENDANT

Defendant raises several issues in his Standard 4 brief on appeal. Defendant first argues that defense counsel was ineffective for failing to request a jury instruction on third-degree criminal sexual conduct. An instruction on a necessarily included lesser offense is proper if "a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Third-degree criminal sexual conduct is a necessarily included lesser offense of first-degree criminal sexual conduct. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). In order for the jury to convict defendant of third-degree criminal sexual conduct in this case, it would have had to find that defendant engaged in sexual penetration with a person at least 13 years of age but less than 16 years of age. MCL 750.520d(1)(a). Because the victim's testimony supported a jury instruction on third-degree criminal sexual conduct, the trial court would have been obligated to give the instruction if defense counsel had requested it. *Cornell*, 466 Mich at 361; however, defense counsel's decision not to request the instruction is presumed to be reasonable trial strategy. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004) (holding there is a strong presumption that counsel's performance constituted sound trial strategy).

Defense counsel's decision not to request the necessarily included lesser offense instruction could have been based on a decision to pursue an all or nothing defense. In this case, if the jury believed the victim, but determined that defendant was not a member of her household, it was obligated to acquit defendant of the first-degree criminal sexual conduct charges. "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Further, it was reasonable for defense counsel not to request an instruction on third-degree criminal sexual conduct because it was inconsistent with defendant's theory of the case, which was fabrication. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Payne*, 285 Mich App at 190. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Accordingly, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness.

Next defendant alleges several types of error regarding his statement about the "Mexican truth" in a letter to the victim. None of defendant's claims of error regarding the phrase were raised in the trial court; accordingly, we review defendant's claims for plain error affecting his substantial rights. *Knox*, 469 Mich at 508.

First defendant maintains that the prosecutor committed misconduct when she allegedly testified as an expert witness about the definition of the phrase "Mexican truth." In defendant's letter to the victim, he instructed the victim to tell the police "the Mexican truth and say nothing

else." During defendant's testimony, the prosecutor asked defendant what he thought the phrase "the Mexican truth" meant. Defendant responded that he was referencing a "Mexican boy" with whom the victim was "involved." The prosecutor asked whether defendant was aware that the phrase "the Mexican truth" was slang for telling authorities a lie in order to avoid punishment. Defendant denied knowledge of that meaning.

It is impermissible for a prosecutor to give testimony. *People v Ellison*, 133 Mich App 814, 820; 350 NW2d 812 (1984) (prosecutor improperly stated during closing argument what fingerprint expert would have testified to had he testified at trial). However, in this case, the prosecutor merely asked defendant a series of questions that contained a proposed definition of the phrase defendant used in his letter. Defendant answered the questions. Lawyers' questions are not evidence. CJI2d 2.7; *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). The fact that the prosecutor's questions contained a definition not in evidence did not convert her questions into testimony, let alone expert testimony. Accordingly, we find no plain error. Further, the jury in this case was instructed that lawyers' comments and questions are not evidence. Because juries are presumed to follow their instructions, defendant's substantial rights were not affected. *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008).

Defendant also argues that the trial court should have declared a mistrial or offered a curative instruction after the prosecution asked defendant about the definition of "the Mexican truth." Defendant has not demonstrated that the trial court's failure to declare a mistrial or offer a curative instruction was plain error affecting his substantial rights. Because the prosecutor did not commit misconduct, defendant's contention that the trial court should have ordered a mistrial or issued a curative instruction is without merit. Similarly, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's questions about the meaning of the phrase and for failing to move for a mistrial. We find that defense counsel was not ineffective for failing to object because the prosecutor's questions were proper and defense counsel is not ineffective for failing to raise a meritless objection or motion. *Payne*, 285 Mich App at 191.

Defendant also argues that the trial court's response to the jury's question, whether it could consider the proffered definition of "the Mexican truth," was insufficient. During deliberations, the jury sent a note to the trial court inquiring whether it could consider the definition of "Mexican truth" as evidence. The trial court responded by instructing the jury that evidence is only the sworn testimony of the witnesses and the admitted exhibits. The trial court again explained that the lawyers' questions were not evidence, and the jury should only accept statements of the lawyers if those statements are supported by the evidence or by the jury's own common sense and general knowledge. Both attorneys agreed on the trial court's response to the jury's question. Consequently, defendant cannot claim error on appeal because defense counsel expressly agreed to the trial court's response to the jury's question. *Carter*, 462 Mich at 215. Nevertheless, we find that the trial court's response to the jury was not error. The trial court properly instructed the jury regarding the law, and jurors are presumed to follow their instructions. *Bahoda*, 448 Mich at 281; *Unger*, 278 Mich App at 227.

Defendant next argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct because there was no evidence that he was in a position of authority over the victim. Defendant's argument is unavailing because the first-degree criminal sexual conduct charges brought against defendant in this case do not require proof that he was in a position of

authority in regard to the victim. Defendant was charged under MCL 750.520b(1)(b)(i), which requires proof that defendant was a member of the same household as the victim. Defendant was not charged under MCL 750.520b(1)(b)(iii), which requires proof that defendant was in a position of authority over the victim. In *Phillips*, this Court explained that "[p]roof of a 'coercive authority figure' was not necessary precisely because the 'household' requirement assumes such a link between the victim and the defendant by virtue of 'the fact that people in the same household, those living together, bear a special relationship to one another.'" *Phillips*, 251 Mich App at 104, quoting *Garrison*, 128 Mich App at 645. Moreover, coercion by an authority figure is an entirely separate theory by which to prove first-degree criminal sexual conduct. See MCL 750.520b(1)(b)(iii). To require such proof "would add an entirely new element to the statute while simultaneously compressing two distinct theories of first-degree criminal sexual conduct into one crime." *Phillips*, 251 Mich App at 104. Accordingly, the prosecution was not required to prove that defendant was in a position of authority over the victim because defendant was only charged under MCL 750.520b(1)(b)(i).

Defendant next challenges the electronic monitoring portion of his sentence. He maintains that the trial court erred when it sentenced him to lifetime electronic monitoring. We agree.

The criminal sexual conduct statute instructs that "the court shall sentence the defendant to lifetime electronic monitoring under section 520n." MCL 750.520b(2)(d). Pursuant to MCL 750.520n(1), a "person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring." The goal of statutory construction is to give effect to the Legislature's intent. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). The Legislature is presumed to have intended the meaning it plainly expressed and clear statutory language must be enforced as written. *Id.*

Accordingly, the plain language of the statute as written requires the conclusion that defendant is entitled to have the lifetime electronic monitoring portion of his sentence vacated because the victim in this case was 14 and 15 years old at the time of the offenses. The prosecution's argument that the Legislature intended to provide mandatory lifetime electronic monitoring for all persons convicted of first-degree criminal sexual conduct is not supported by the plain language of the statute.

Lastly, defendant argues that the cumulative effect of the trial errors deprived him of his due process right to a fair trial. We review this issue "to determine if the combination of alleged errors denied defendant a fair trial." *Dobek*, 274 Mich App at 106. Because we have concluded that there was only one error (improper sentencing to lifetime electronic monitoring), which alone does not require reversal, defendant is not entitled to a new trial based on the cumulative effect of errors. When there are no errors to accumulate, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Defendant's convictions are affirmed and his sentences are affirmed in part and vacated in part. We remand for the correction of the judgment of sentence in accordance with this

opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering