STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2011
v	No. 299882 Muskegon Circuit Court
NATHON SCOTT COFFELL, Defendant-Appellant.	LC No. 09-058463-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant, Nathon Scott Coffell, appeals as of right his conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i). Defendant was sentenced to 17 to 40 years' imprisonment. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

I. FACTS

This appeal arises from defendant's conviction for committing a sexual assault on a 14 year-old female victim while she was living at defendant's residence, in the early morning hours of September 11, 2009. Following eviction from their previous residence, the victim's family moved into defendant's residence on August 31, 2009. Defendant's residence consisted of "an old business that had kind of been converted into a house." According to testimony presented at trial, the residence had two levels; the upper level was accessible from the lower level through the interior of the residence by going through a shared basement. The residence contained only one bathroom and one kitchen, both located on the upper level. In summing up the living arrangement, the victim's father's girlfriend[1] explained: "we cooked altogether and we ate altogether and we watched TV together."

[1] The victim's father's girlfriend married the father after the sexual assault.

The victim and her brother stayed on the upper level, where defendant, his live-in girlfriend Jennifer Jillian Sunagel,[2] and defendant's children slept. The victim had known Sunagel for "years" and had known defendant for "quite awhile." The victim described defendant as "like sort of [an] uncle" to her. The victim would either sleep on the couch on the upper level or, when defendant's sons were not home, the victim would sleep on the bunk bed in their room.

Before the sexual assault on the morning of September 11, 2009, the victim testified that defendant sexually assaulted her on two previous occasions. The victim was uncertain how long she had resided with defendant when the first sexual assault occurred. Concerning the first sexual assault, the victim testified that she had been washing dishes and defendant asked her to come into his bedroom. Because the victim was tired, she laid on defendant's bed, and while she was on defendant's bed, defendant rubbed the victim's stomach and put his hand down her pants. When defendant did this, the victim told him to stop and left the room. At the time, the victim did not tell anyone about this incident. Defendant continued to "flirt" and "tickle" the victim, but nothing more serious happened until the second sexual assault.

According to the victim's testimony, the second sexual assault took place on the night of September 10, 2009. Defendant was repairing the bunk beds in his detached garage. Defendant asked the victim to come to the garage and help him fix the beds, even though the victim's father was in the residence at the time. While the victim was in the garage with defendant, Sunagel appeared several times and argued with defendant. At one point, Sunagel became so agitated she unplugged defendant's power tool. After Sunagel did this and left the garage, defendant locked the garage door. After locking the door, defendant led the victim by the hand to his van that was parked in the garage and made her lay on her stomach. Defendant proceeded to pull the victim's pants down and attempted to vaginally penetrate her with his penis. The victim testified that defendant was almost successful in penetrating her, but before he could, Sunagel came to the locked garage door and began yelling. When Sunagel began yelling, the victim put her pants back on and left the garage. Again, the victim did not immediately tell anyone what happened.

Then, in the early morning hours of September 11, 2009, while the victim was sleeping in the bunk bed room, defendant woke the victim and told her to "come with him." Defendant did not explain where he was taking the victim, but he pulled the victim into the bathroom. The victim testified that when she entered the bathroom she was still half-asleep, dizzy, and the "light was really bright." After entering the bathroom, defendant closed the door, and removed the victim's pants and underwear. Defendant then touched the victim's breasts under her shirt. Defendant also inserted his fingers into the victim's vagina. While defendant was sexually assaulting the victim, he forced her onto the bathroom floor. After defendant forced the victim onto the floor, defendant took out a bottle of "clear liquid stuff" that had a "purple cap." Defendant applied the liquid to his penis and proceeded to vaginally penetrate the victim. The

[2] The trial transcript spells her last name "Sunagel," but the sentencing transcript spells it "Sunagle." On appeal, plaintiff uses the former spelling, while defendant uses the latter. We used the spelling "Sunagel" because it is the spelling utilized in the trial transcript.

victim asked defendant to stop because it hurt, but defendant did not stop. The victim believed defendant ejaculated "a little, not much" while penetrating her.

Although she did not hear anyone, the victim believed defendant stopped after a short time because he heard someone else approaching. The victim testified that when she got up, there was blood on the floor, which she proceeded to clean up. After the sexual assault, the victim went back into the bunk bed room and tried to sleep, but could not fall asleep, stating that she was "scared and nervous" after the sexual assault.

Later that morning, the victim's father drove her to school. On the way to school, the victim did not say anything to her father. When the victim arrived at school, she told one of her classmates about the incident and then told her teacher. After telling her teacher what happened, the victim was brought to the principal's office and the principal called her father and the police. After the police arrived, the victim was taken for a physical examination.

The victim's father telephoned his girlfriend and told her about the sexual assault. After learning of the sexual assault, she gathered the sheets from the bedroom and the victim's pants and underwear the victim wore the previous evening and took them to the hospital where they were turned over to the police. Sara Thibault, a forensic scientist, testified at trial that the victim's pajama bottoms from the night of the sexual assault were positive for seminal fluid and sperm cells. Ann Hunt, a second forensic scientist, testified that the "semen stain" on the pajamas matched the DNA profile of defendant. Defendant contended at trial that Sunagel helped him ejaculate into a towel the morning of September 11, 2009, and that towel was thrown in the same laundry basket where the victim's pants were found. However, when questioned about this matter, Sunagel did not recollect defendant's version of what happened.

Defendant testified at trial and denied sexually assaulting the victim or having sex with the victim on the floor of the bathroom in the early morning hours of September 11, 2009. Defendant also denied having ever seen the "bottle thing the prosecutor has," referencing the bottle of lubricant with the purple top. Defendant explained that he used a different brand of lubricant with his wife and that he did not own a bottle like that on September 11, 2009. Defendant denied ever flirting with the victim, but admitted he would occasionally tickle her. However, Sunagel testified that the bottle with the purple top was a product called "Astro Glide." Sunagel said she and defendant did use it several times, and it was purchased "before he [defendant] left for jail."

II. ANALYSIS

Defendant first argues that his constitutional right to confront witnesses was violated when the trial court refused to allow him to present evidence relating to the victim's prior allegation of rape against another individual. Before the trial began, the trial court ruled on a motion in limine filed by the prosecution regarding prior rape allegations made by the victim. The allegations related to an accusation by the victim that she "had been sexually assaulted by another juvenile." Defendant's trial counsel argued that the evidence of plaintiff's prior rape allegation would show bias and suggested that the evidence might be admissible because the allegations might be false. However, defendant's trial counsel presented no evidence demonstrating any basis for a claim of bias or a claim that the victim's prior allegations were

false. The trial court made a preliminary ruling that precluded the prior rape allegations from being presented to the jury, but allowed defendant's trial counsel an opportunity to reargue the motion later. The trial court specifically noted that, with respect to any exception to the rape-shield statute based on case law interpreting the Confrontation Clause, defendant would need to make an offer of proof regarding the basis for the exception. Defendant never attempted to make any such offer of proof and defendant's trial counsel never raised the issue regarding the prior rape allegations again.

The issue having been raised in a motion in limine, defendant has preserved this issue. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A trial court's ruling on "evidentiary issues" is generally reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). A trial court's ruling on a "constitutional question," such as the Sixth Amendment right to confront witnesses, is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

> Michigan's rape-shield statute, MCL 750.520j, provides, in relevant part:
> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.
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> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MRE 404(a)(3) "parallel[s]" the admissibility requirements of MCL 750.520j. *People v Morse*, 231 Mich App 424, 429; 586 NW2d 555 (1998).]

Hence, Michigan's rape-shield statute generally precludes the admission of "specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct." MCL 750.520j(1). Defendant does not argue the evidence was admissible under MCL 750.520j, but instead argues his constitutional right to confront witnesses was violated. Both the Sixth Amendment of the United States Constitution and the Michigan Constitution provide that a criminal defendant has a right to "to be confronted with the witnesses against him." Our Supreme Court addressed the relationship between the Sixth Amendment right of confrontation and MCL 750.520j in *People v Arenda*, 416 Mich 1, 7-8; 330 NW2d 814 (1982). *Arenda* recognized that, "[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process." *Arenda*, 416 Mich at 8, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973) (citation omitted; quotation omitted). However, *Arenda* also recognized that, "[t]he right to confront and cross-examine is not without limits. It does not include a right to cross-examine

on irrelevant issues. It may bow to accommodate other legitimate interests in the criminal trial process . . . and other social interests." *Arenda*, 416 Mich at 8 (citations omitted). The *Arenda* Court determined that the restrictions placed on cross-examination by MCL 750.520j did "not deny or significantly diminish defendant's right of confrontation." *Arenda*, 416 Mich at 11.

In *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984), the constitutionality of MCL 750.520j was challenged on the ground that it violated the Confrontation Clause of the Sixth Amendment. The *Hackett* court held that, "neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to admit all relevant evidence or cross-examine on any subject." *Hackett*, 421 Mich at 347. *Hackett* explained that there were certain circumstances where MCL 750.520j yielded to the Confrontation Clause:

> We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [*Hackett*, 421 Mich at 348 (citations omitted).]

With respect to MCL 750.520j, in *Adair*, our Supreme Court recognized that:

> The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation. [*Adair*, 452 Mich at 484, quoting *Hackett*, 421 Mich at 349.]

Thus, a defendant arguing that the Confrontation Clause requires the admission of evidence otherwise excludable under MCL 750.520j must "initially [ ] make an offer of proof as to the proposed evidence and [ ] demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court" must deny the admission of the evidence. *Hackett*, 421 Mich at 350.

In the present case, the trial court noted that defendant failed to make any offer of proof that would indicate the proposed evidence of the victim's other rape allegation would show the victim was biased against defendant. Instead, defendant, on appeal, argues that because this case came down to a credibility determination between the victim and defendant, the trial court should have admitted the evidence relating to the victim's prior rape allegations against another individual. Consequently, we concur with the ruling of the trial court that defendant has failed to demonstrate that the evidence was of a character that would place it within one of the "limited situations" where the Confrontation Clause would be implicated and require the admission of the evidence. *Hackett*, 421 Mich at 348. In fact, defendant was offered an opportunity by the trial

court to make an offer of proof with respect to any of the exceptions discussed in *Hackett*, but defendant failed to do so.

Additionally, to the extent defendant implies the victim's prior rape allegation may have been false, defendant has failed to offer any proof, or even directly claim, that the prior allegation was false. It is true that, "[t]estimony concerning prior false allegations does not implicate the rape shield statute," *People v Jackson (After Remand)*, 477 Mich 1019; 726 NW2d 727 (2007), however, defendant has failed to demonstrate there was any evidence demonstrating prior false allegations by the victim. Therefore, defendant failed to make an offer of proof necessary to support the claim that the Confrontation Clause required the admission of the allegation. See *Hackett*, 421 Mich at 348. Further, this exception is generally only applicable where, "before trial, the complainant has acknowledged that a prior accusation was false." *People v Garvie*, 148 Mich App 444, 448; 384 NW2d 796 (1986). There is no evidence or claim by defendant that the victim ever acknowledged the previous allegation was false. Consequently, the trial court did not err in refusing to admit the evidence for this purpose and this denial did not violate the Confrontation Clause. *Hackett*, 421 Mich at 350; see also *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). Hence, the trial court did not abuse its discretion in granting the motion to exclude the evidence.

Defendant next argues that there was insufficient evidence to support his conviction because there was no evidence that the victim was a member of defendant's "household" for purposes of MCL 750.520b(1)(b)(i). In reviewing claims of insufficient evidence, "[a] reviewing court must consider the evidentiary facts not in isolation, but in conjunction with one another, in a light most favorable to the prosecution." *People v Nowack*, 462 Mich 392, 404; 614 NW2d 78 (2000). We "consider whether there was sufficient evidence to justify a rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt." *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The elements of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i), are met where: (1) defendant engaged in sexual penetration with the victim; (2) the victim is "at least 13 but less than 16 years of age" and; (3) defendant is a member of the same household as the victim. See also *People v Phillips*, 251 Mich App 100, 102; 649 NW2d 407 (2002), aff'd 469 Mich 390 (2003). On this issue, defendant challenges the third element of the offense, that he was a member of the same household as the victim. In *People v Garrison*, 128 Mich App 640, 646-647; 341 NW2d 170 (1983), we explained the meaning of the term household for purposes of MCL 750.520b(1)(b)(i) as:

> 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.

Garrison found that a victim who lived with her mother and the defendant during a "court-ordered extended visitation over the summer months" was a member of the defendant's household for purposes of MCL 750.520b(1)(b)(i). *Id.* at 642, 647. This Court later clarified that a showing that a defendant was a "coercive authority figure" or that there was an ongoing subordinating relationship is not required by MCL 750.520b(1)(b)(i) or *Garrison*. *Phillips*, 251 Mich App at 104.[3]. In *Phillips*, the victim was found to be a member of the defendant's "household" where she had been living in the defendant's home for approximately four months, with this Court concluding that the *Garrison* "Court meant to indicate that proof 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.

When viewed in a light most favorable to the prosecution, we find that the evidence presented at trial supports a finding that the victim was a member of defendant's household. See *Nowack*, 462 Mich at 404. "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993) (citations omitted). We find that the following circumstantial evidence supports a finding that defendant's residence was one "household": the victim's family moved their possessions to the residence; the entire residence had only one bathroom, one living room and one kitchen; the victim and her family ate their meals with defendant and his family; and there was interior access between the upper level and the lower level of the residence. Defendant argues that because the victim spent some nights away from the residence, she was not a member of his household. However, as previously noted, "the length of the residence or the permanency of the residency has little to do with" determining whether a victim is a member of a defendant's "household." *Garrison*, 128 Mich App at 646. While the victim spent some nights away, she stayed at defendant's residence on other nights and these were not mere "chance visit[s]." *Id.* When viewed in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that the victim and defendant were part of a "family unit residing under one roof for [ ] [a] time other than a brief or chance visit." *Id.*

Defendant next argues that the trial court erred in failing to sua sponte define the term "household" for the jury. A claim of instructional error is generally reviewed de novo. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Challenges to jury instructions are considered "in their entirety to determine whether the trial court committed error requiring reversal." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructions must include "all the elements of the charged offense." *Id*. Even imperfect jury instructions "do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id*. Because defendant failed to preserve this issue, it is reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159

[3] In affirming this Court's decision in *Phillips*, our Supreme Court addresses only addressed the issue relating to a polygraph examination; it did not address the issue involving the interpretation of the word "household." *People v Phillips*, 469 Mich 390; 660 NW2d 657 (2003)

(2003). To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

> The trial court instructed the jury, with respect to the term "household," that:
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> [A]t the time of the alleged act, the Defendant and [ ] [the victim] were living in the same household.
>
> To establish same household, the prosecutor does not have to prove that the defendant was in a position of authority over the victim. The prosecutor does not have to show any minimum length of residency or permanency of residency.

Defendant argues that because *Garrison*, 128 Mich App 640, explained the meaning of the term "household" for purposes of MCL 750.520b(1)(b)(i), the trial court was required sua sponte to include a definition of "household" in the jury instructions. However, this Court in *Garrison* ruled that the term "household" has a fixed meaning in our society, not that a trial court must instruct the jury on that fixed meaning. Moreover, "[j]urors are presumed to have common sense, and to understand common English." *People v Allen*, 466 Mich 86, 91; 643 NW2d 227 (2002), quoting *Hamilton v People*, 29 Mich 173, 194 (1874). The definition of every term contained in the elements of the crime need not be sua sponte provided to the jury "because it is not necessary to define [ ] [a] commonly understood phrase." *Allen*, 466 Mich at 92. Additionally, even if defendant could demonstrate plain error, he could not show prejudice because, as discussed *supra*, there was sufficient evidence for a rationale trier of fact to find beyond a reasonable doubt that defendant and the victim were members of the same household.

Defendant next argues the trial court erred in the scoring of offense variable 19 (OV 19) and offense variable 8 (OV 8). "This Court reviews de novo as a question of law the interpretation of the statutory sentencing guidelines." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation omitted). "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." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). A trial court's factual findings at sentencing are reviewed for "clear error." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "In general, '[s]coring decisions for which there is any evidence in support will be upheld.'" *Waclawski*, 286 Mich App at 680 (citation omitted).

Defendant argues that the trial court abused its discretion in scoring OV 19 at ten points because there was no evidence he committed perjury. OV 19 is scored at ten points where: "The offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Perjury may be properly scored under OV 19. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008). Our Supreme Court has concluded that the offense of perjury, MCL 750.422, as defined by MCL 750.423, means: "[A] willfully false statement about any matter or thing concerning which an oath was authorized or required falls within the statutory definition of perjury." *People v Lively*, 470 Mich 248, 254; 680 NW2d 878 (2004). In the present case, defendant, while under oath, denied having any knowledge of a bottle of

lubricant called Astro Glide. Contrary to defendant's testimony, the victim testified she saw defendant with the bottle just before he sexually assaulted her. Additionally, defendant's live-in girlfriend, Jennifer Sunagel, testified that she and defendant purchased the bottle of Astro Glide *together* mere days before the commission of the crime and that defendant paid for the Astro Glide. The trial court's factual finding that defendant perjured himself was not clearly erroneous because there was evidence to support the finding. See *Waclawski*, 286 Mich App at 680.

Finally, defendant argues the trial court erred in scoring OV 8 at 15 points because the movement of the victim from the bedroom to the bathroom was merely incidental to the offense and, therefore, does not constitute asportation. OV 8 is scored at 15 points where: "A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). "The term 'asportation' is not defined in the sentencing guidelines statute," but has been interpreted by this Court to require "some movement of the victim . . . that is not merely incidental" to the underlying offense. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

In *Spanke*, this Court found that the victims were asported to a place of greater danger where the defendant brought them to his home. *Spanke*, 254 Mich App at 647-648. The *Spanke* Court held: "The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others." *Id.* at 648; see also *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005). Similarly, in the present case, the victim was moved from the bedroom where others had access, to a place of greater isolation, a bathroom with a door that locked. Such movement was a conscious decision to move the victim to a place of greater isolation and therefore of greater danger to the victim. Further, defendant's movement of the victim was not merely incidental to first-degree criminal sexual conduct because asportation is not an element of first-degree criminal sexual conduct. Additionally, testimony from the victim revealed that after she was moved from her bed to the bathroom she was half-asleep and "dizzy" from the "light that was really bright." Such evidence supports a finding that defendant's movement of the victim was intended to disorient her and thus make her more vulnerable to a sexual assault. We also find that the record supports the trial court's ruling on this issue as defendant made the conscious choice to move the victim to a place where his misconduct was less likely to be discovered. Consequently, because sufficient evidence existed to support the trial court's scoring of OV 8, the trial court did not abuse its discretion. *Cox*, 268 Mich App at 455.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello