STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	Nos. 302026 302038 302045
DUNCAN LORENZO ALEXANDER, Defendant-Appellant.	Macomb Circuit Court LC Nos. 09-5130-FC 09-5132-FC 09-5135-FC

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In this consolidated appeal, defendant appeals by right from the judgments of sentence entered following a jury trial consolidating three cases. We affirm defendant's convictions. In Docket No. 302038 (LC No. 09-5130-FC), defendant was convicted of one count of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(*iv*), two counts of first-degree criminal sexual conduct (CSC I) against a person under thirteen years of age, MCL 750.520b(1)(a), and two counts of second-degree criminal conduct (CSC II) against a person under thirteen years of age, MCL 750.520c(1)(a); defendant was found not guilty of one count of gross indecency between a male and a female, MCL 750.338b. In Docket No. 302045 (LC No. 09-5132-FC), defendant was convicted of two counts of CSC I against a person under thirteen years of age, and one count of gross indecency between a male and female; defendant was found not guilty of one count of child sexually abusive activity, MCL 750.145c(2). In Docket No. 302026 (LC No. 09-5135-FC), defendant was convicted of one count of CSC I against a person between the ages of thirteen and sixteen over whom defendant held a position of authority that was used to coerce the victim to submit, MCL 750.520b(1)(b)(*iii*), one count of child sexually abusive activity (coercion of a child into sexually abusive activity for the purposes of producing child sexually abusive material), MCL 750.145c(2), and one count of possession of child sexually abusive material, MCL 750.145c(4). Defendant received concurrent sentences for all charges with credit for 615 days served; defendant's five CSC I sentences were 25 to 40 years each, with the other sentences carrying lesser terms.

I. BASIC FACTS AND PROCEDURAL HISTORY

A lengthy jury trial was held in this case. Each lower court case is related to a separate CSC victim (AH, KB, and TH); KB's case (Docket No. 302038) additionally contains defendant's possession with intent to deliver cocaine conviction.

A. INVESTIGATION AND ARREST

Detective Sergeant James Selewski of the Sterling Heights Police Department was working in the youth division of the Sterling Heights Police Department in 2009. Selewski became the officer in charge of a CSC investigation involving (at the time) two complainants, KB and AH. Selewski called Detective Galewski to interview KB and AH. The two complainants were interviewed and a forensic examination of AH was conducted. AH was given a full-body examination and a sexual abuse evidence kit was completed. Anal and vaginal swabs were taken, as well as a swab from AH's left breast. A hair was found in AH's underwear. Later, "suspect" samples of defendant's DNA and hair were taken, including a penile swab.

Based on the interviews, Selewski ordered that defendant be arrested and obtained a search warrant for defendant's home. Police entered defendant's home searching for photographs and other forms of media. Police seized items from defendant's bedroom, including a desktop computer, laptop computer, video cameras, bedding, and clothing. During the search, police discovered three baggies containing white powder under defendant's mattress. Police also found bottles of Inositol, a purported nutritional supplement that is often used to cut cocaine, as well as a digital scale.

Defendant was arrested and brought to the Macomb County Sheriff's office, where he was interviewed by Detective Anderson of the Macomb County Sheriff's Office. Defendant waived his *Miranda* rights via written form. Defendant told Anderson that he lived with AH and her mother, SH, to whom he was engaged at the time. KB was a friend of the family. Defendant denied sexually abusing AH or KB. He stated that on the day he allegedly assaulted AH, he had grounded her for not doing her schoolwork. He further stated that he had kissed her stomach in a playful manner, and that a short time later he caught AH masturbating.

Regarding KB, defendant stated that he had taken photographs of KB in order to assist her with getting into modeling; he denied taking any nude or inappropriate pictures. Defendant stated that he thought KB was flirting with him and that they had spoken about sexual issues and masturbation. Defendant stated that he had taken KB to a convention on modeling and that during the visit, he had photographed himself nude in the hotel room with the intent of sending the pictures to SH. He stated that KB was not present when he took the pictures. He also stated that KB had taken pictures of herself that were inappropriate and placed them on his computer. He stated that he deleted the pictures when he discovered them.

The white powder in the bags was identified by laboratory testing as cocaine. Biology trace testing revealed saliva on AH's genital swabs and underpants. The hair found in AH's underwear was microscopically similar to defendant's pubic hair. DNA testing revealed that the saliva found on AH's genital swab belonged to AH. Defendant's penile swab revealed a mixture of two individuals, one of whom was defendant. AH could not be excluded as the other donor.

In 2009, TH alleged that she had been sexually abused by defendant. She was interviewed at CARE House[1] by a forensic interviewer. As a result of this interview, additional charges were filed against defendant.

B. RELEVANT PRETRIAL MOTIONS

On February 18, 2010, the prosecution requested that the trial court join the three files against defendant into one trial, arguing that the offenses were related under MCR 6.120(B)(1)(c), and additionally arguing that evidence of sexual abuse of each victim would be admissible in the other cases against defendant. The trial court determined that no prejudice would result from joinder of the trials and granted the motion to join the trials. Defendant requested at the beginning of trial that the trials be severed; the trial court denied the request.

On August 3, 2010, defendant filed a motion to dismiss the charges against him, claiming his right to a speedy trial had been violated. After a hearing on September 13, 2010, the trial court denied defendant's motion.

C. TRIAL

Each of the victims testified at defendant's trial. KB testified that defendant had known her mother for 15 years, and that she called him her uncle and looked up to him. She first met defendant in 2007 when she was 13. KB knew both AH and TH. She testified that in February of 2009, defendant invited her to go to a water park in Ohio with him and his children. However, after she arrived at defendant's house, defendant told her there was a problem with the hotel reservations and they could not go. Instead KB stayed at defendant's house that weekend with defendant and his children. On Sunday, defendant took his children home; afterward he and KB went to McDonald's and talked about KB's interest in modeling. Defendant indicated to KB that he could help her start a modeling career. Defendant made a phone call, purportedly to a modeling agency, and told KB that the woman he spoke to wanted pictures of her. Defendant offered to take the pictures.

Defendant took pictures of her hands, feet, legs, and face. KB also testified that defendant took 14 photos that were admitted into evidence. The photos depicted her in various poses, including bending over and exposing her buttocks, pulling her top up to expose her stomach, on the bed with her legs spread and a stuffed animal in front of her genital area, and pictures that exposed "thong" underwear that defendant gave her to wear.

KB testified that defendant then told her to lie on the bed and that she "needed to make the camera want [her]." She stated that when she turned around, defendant had removed his clothing and was touching his penis with his hand. Defendant then removed her underwear and placed his tongue in her vagina. Defendant took KB home after taking her to get her nails done.

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[1] CARE House is a child advocacy center in Macomb County that conducts forensic interviewing for the purpose of coordinating investigation, prosecution, and treatment of child sexual and physical abuse. See http://www.mccarehouse.org (last visited August 12, 2013).

KB testified that she knew what defendant did was wrong, but that she did not tell anyone because she thought it was her fault and her mother would not believe her.

About a month later, KB agreed to accompany defendant to a purported photo shoot at a hotel. She testified that in the hotel room, defendant directed her to take pictures of himself nude and touching his penis. Two pictures of defendant nude were admitted into evidence.

KB's mother testified that she became suspicious after conversing with defendant's fiancée and discovering that she was not present during the weekend of the attempted trip to the water park. She questioned KB; after KB told her what happened, she took KB to the police station.

AH testified that she lived with defendant, TH (her sister), and her mother, SH. She was eleven in 2009. In the parking lot of the police station, AH volunteered that she had been "molested" by defendant, using that exact word. She testified that defendant had touched her vaginal area with his hand, tongue, and penis. She testified that at least three incidents happened—on defendant's bed, on a couch, and on a mattress in the basement. She also testified that defendant touched her breasts during all three incidents. She denied masturbating and denied that defendant ever kissed her stomach in a playful way. AH testified that she was sexually abused as punishment for missing homework assignments.

TH testified that she lived with defendant, AH, and her mother, SH, in 2009. In July of 2009, TH disclosed that she had also been sexually abused by defendant. She testified that defendant would make her do a "stand" when she was being punished—he would make her take off her pants and underwear and get on her hands and knees, and would touch her vagina with his hands and penis. This happened four or five days per week from the age of nine to thirteen. She also testified that defendant would rub his penis until he ejaculated onto a towel.

SH testified that following defendant's arrest, defendant asked her throw away his "come towel," put a CD holder in boiling water, and flush other items down the toilet. She denied influencing any of the victims' testimony and stated that she told them to tell the truth. She testified that defendant never sent her any nude pictures, and never told her that he caught AH masturbating.

A DNA analyst, Shiao-Mei Smith, testified as to the testing of the DNA found on defendant's penile swab. She testified that the she was able to deduce a "partial [DNA] profile" of the second DNA donor from eight locations on the provided DNA swab, and that the eight locations matched AH's DNA profile. Smith further testified that this partial profile could be found in one of 4.7 billion people in the Caucasian population. Smith admitted on cross examination that she could not state with scientific certainty that DNA was from AH, but only that she could not be excluded. Smith also testified that she had initially received mismarked samples and had to request new samples. She stated she had not received any DNA samples from SH.

A police expert in forensic computer investigation, Detective Miller, testified as to his investigation of defendant's computer. Miller recovered more than 20 pictures of KB in various stages of undress that had been saved to the computer and then deleted. Miller also located two

pornographic video files saved onto the computer. The videos depicted young girls engaged in sexual acts. The names of the videos were "14 YO girl reaches orgasm peeing with big toys vibrator.mpg" and "15 YO girl fingers 14 YO friend.mpg."

Defendant presented testimony from a friend of his and his son as to his good character and his involvement in the music and lawn aeration businesses. Defendant also testified and denied taking suggestive photos of KB, claiming that she photographed herself with the self-timing feature on his camera and that he deleted the pictures when he discovered them. He denied removing her underwear, removing any of his clothing, or masturbating in front of her. Defendant stated that he took nude photos of himself at the hotel room while KB was not present, to send to his fiancée. He denied sexually abusing AH and TH. He stated that he caught AH masturbating and that he told SH this. He testified that he had taken the cocaine and scale from a friend at a party. Defendant stated that he used Inositol as a workout supplement. Defendant also testified that he downloaded pornographic videos from "Lime Wire" without necessarily looking at the titles, and that he had searched for "squirting" videos.

The trial court denied defendant's motion for a directed verdict related to the possession with intent to deliver cocaine charge and the gross indecency charges. The jury convicted defendant as stated above.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his CSC convictions;[2] specifically, defendant maintains that the testimony of the victims was not credible. Defendant also argues that the prosecution failed to establish that defendant intended to deliver the cocaine. We disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

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[2] Although defendant, in his "Statement of Questions Presented," states that the evidence was insufficient to support his conviction of possession of child sexually-abusive material, he does not make this argument in the body of his brief. A defendant is required to appropriately argue the merits of the issues he identifies in his statement of questions presented. *People v Jones* (*On Rehearing*), 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Further, a defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). Defendant's failure to address the merits of his claim regarding his conviction for possession of child sexually-abusive material constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Further, defendant has made no reference to his gross indecency convictions; this Court therefore does not address the sufficiency of the evidence in support of those convictions.

However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

A. CSC I AND II

Defendant argues that there was no credible evidence that any of the victims were sexually abused, because their testimony was inherently incredible. Defendant essentially argues that the youth of the victims, combined with a lack of corroborating evidence, rendered their testimony unbelievable and the evidence insufficient. We disagree.

A defendant is guilty of CSC I if he engages in sexual penetration with a person under 13, or a person between the ages of 13 and 16 over whom the defendant has a position of authority that the defendant uses to coerce the victim to submit. MCL 750.520b(1)(a), (b)(*iii*). A defendant is guilty of CSC II if he engages in sexual contact with a person under 13 years of age, or a person between the ages of 13 and 16 over whom the defendant has a position of authority that the defendant uses to coerce the victim to submit. MCL 750.520c(1)(a)(b)(*iii*). Sexual contact includes the intentional touching of the victim's intimate parts or the clothing covering the victim's intimate parts for the purpose of sexual arousal or gratification or for a sexual purpose. MCL 750.520a(q). Sexual penetration means sexual intercourse, cunnilingus, or the intrusion of any part of a person's body into the genital or anal opening of another, however slight. MCL 750.520a(r).

In general, the testimony of witnesses is sufficient to prove the elements of a crime beyond a reasonable doubt. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, MCL 750.520h provides that "the testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g."

Here, each victim testified consistently as to defendant's sexual abuse; including inserting his penis at least between the lips of the vaginas of AH and TH, performing cunnilingus on KB and AH, and touching AH's breasts. Further, the DNA expert testified that AH's DNA could not be excluded from defendant's penile swab, and a hair found in AH's underwear was microscopically similar to defendant's pubic hair. The ages of all the victims were established as either under 13 (AH and TH) or between 13 and 16 (KB). KB also testified that she considered defendant her uncle and looked up to him.

Evidence, in the form of victim testimony, was thus presented that was sufficient to enable a rational jury to conclude that defendant had committed the acts of CSC I and CSC II for

which he was charged. Defendant essentially asks this Court to reweigh the evidence and judge witness credibility. Such an action is beyond the scope of this Court's review of the sufficiency of the evidence.[3] In certain rare cases, a reviewing court may make judgments on the credibility of a witness, such as:

> if the testimony contradicts indisputable physical facts or laws, where the testimony is patently incredible or defies physical realities, where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror, or where the witness's testimony has been seriously impeached and the case marked by uncertainties and discrepancies. [*People v Lemmon*, 456 Mich at 625, 643-644; 576 NW2d 129 (1998) (internal citations and quotation marks omitted).]

None of these circumstances are present here. Defendant argues that the fact that the victims had a positive relationship with defendant, that the victims waited a varying amount of time to come forward, and that AH and TH (who had viewed defendant as a stepfather and role model for seven years) made contact with defendant after his arrest renders their explicit, consistent testimony incredible. We disagree. The victims were subjected to full and lengthy cross-examination. Defendant denied committing any sexual acts and offered alternate versions of events. The jury weighed the evidence and found the victim's testimony credible. Nothing more was needed to sustain his CSC convictions. MCL 750.520h; *Davis*, 241 Mich App at 700.

B. POSSESSION OF COCAINE WITH INTENT TO DELIVER

Defendant also argues that the evidence was insufficient to support the intent element of the charge of possession of cocaine with the intent to deliver.

To convict a defendant of possession with intent to deliver a controlled substance, MCL 333.7401, the prosecution must prove that the recovered substance is a narcotic, that the substance was of at least the quantity specified by the charge, that the defendant was not authorized to possess the substance, and that the defendant knowingly possessed the substance intending to deliver it. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); see also *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201(1992). The primary components of the offense are possession and intent. *Wolfe*, 440 Mich at 519. Only minimal circumstantial evidence is required to prove intent, because of the difficulty in proving an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

[3] All of defendant's citations related to witness credibility refer to certain rare situations where a new trial may be granted because of incredible witness testimony. See, e.g., *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Notwithstanding the fact that such arguments are properly brought in an appeal of a denial of a motion for a directed verdict, see *id*. at 632, we do not find any of those circumstances to be present here, as stated above.

Defendant essentially admits that the evidence was sufficient to prove possession, but argues that no evidence was presented of intent to deliver. We disagree. A defendant's intent may be inferred from all the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Specifically, intent to deliver may be inferred from the manner in which a controlled substance is packaged and other circumstances surrounding defendant's arrest. *Wolfe*, 440 Mich 508, 516-517.

Here, Selewski testified that three baggies of a powder that turned out to be cocaine were found in defendant's room, along with a scale and bottles of a substance commonly used as a cutting agent. Selewski testified that the baggies, scale, and cutting agent found in the room were consistent with the distribution of controlled substances. Viewed in the light most favorable to the prosecution, a jury could rationally conclude from the fact that the cocaine was packaged in multiple baggies and the presence of a scale and cutting agent that the cocaine was not solely for defendant's personal use and that he intended to deliver it to others. See *Fetterley*, 229 Mich App at 518. Although defendant presented an alternate explanation for his possession of the cocaine, scale, and cutting agent, the jury did not find defendant's explanation credible. We find no basis on which to disturb the jury's determination.

III. MOTION FOR JOINDER

Defendant next argues that the trial court erred in granting the prosecution's motion to join the three cases against him (one case for each victim) into a single trial, and by denying his motion to sever those trials. We disagree.

A trial court's decision to join or sever cases is a mixed question of fact and law. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). "To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *Id*. The trial court's factual findings are reviewed for clear error while the trial court's interpretation of court rules and statutes is reviewed de novo. *Id*. However, the trial court's ultimate decision on permissive joinder of related charges lies "firmly within the discretion of trial courts." See *People v Breidenbach*, 489 Mich 1, 14; 798 Mich 2d 38 (2011). Thus, if the trial court's determination that offenses are "related" under the court rule is not based on clearly erroneous fact-finding or the misinterpretation of court rules or statutes, we review the trial court's decision to join or sever cases for an abuse of discretion. See *id*.

MCR 6.120(B)-(C) provides:

> **(B) Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

(C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

"The plain language of MCR 6.120 permits joinder if offenses are 'related." *Williams*, 483 Mich at 233. While joinder is permissible for related offenses, severance of unrelated offenses on a defendant's motion is mandatory. MCR 6.120(C).

In granting the prosecution's motion, the trial court referred to MCR 6.120(B)(1)(c), which provides that offenses are "related" if they constitute parts of a single scheme or plan. The trial court stated that its decision was informed by MCL 768.27a, which provides in relevant part that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

With respect to the trial court, while MCL 768.27a has bearing on the issue of joinder, especially with regard to the possibility of prejudice to defendant, see, e.g., *Williams*, 483 Mich at 237 ("[J]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial"), application of that statute is not necessary to determine whether the offenses at issue are "related."

Our Supreme Court has stated that offenses are "related" for the purposes of joinder under MCR 6.120(B)(1)(c) when the evidence indicates that "defendant engaged in ongoing acts constituting parts of his overall scheme or plan." *Williams*, 483 Mich at 235. Here, the evidence suggests that defendant engaged in ongoing acts related to his scheme of sexually abusing young girls over whom he held a position of authority. In the case of both AH and TH, defendant's sexual abuse was related to his parental/disciplinarian role over them; while in KB's case, the abuse took place while defendant was temporarily in charge of her supervision. All three cases involved defendant directing the victims to assume certain positions, whereupon he would attempt to penetrate or perform cunnilingus on them and masturbate himself. All three cases involved conduct, at least in part, that took place in defendant's bedroom. We conclude that the

trial court did not err in determining that these offenses were "related" under MCR 6.120(B)(1)(c).[4]

Further, there was little potential for confusion; although there were multiple victims, most of the charges involved the same location and the testimony of many of the same witnesses. MCR 6.120(B)(2). Having concluded that the offenses were related, the trial court was within its discretion to grant the prosecution's motion for joinder, and later deny defendant's motion for severance.

Finally, any error by the trial court in granting the prosecution's motion would have been harmless in light of MCL 768.27a. The prosecution moved for the admission of evidence of defendant's other acts evidence in all cases. The trial court noted that each complainant would be permitted to testify in all three cases. As stated above, a defendant cannot be prejudiced by joinder more than he would have by the admission of the other evidence in a separate trial. *Williams*, 483 Mich at 237.

IV. SPEEDY TRIAL

Next, defendant argues that the trial court erred in failing to dismiss the case against him for violation of his right to a speedy trial. The issue of whether defendant was denied a speedy trial presents mixed question of fact and law. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). The trial court's factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Violation of the constitutional right to a speedy trial requires dismissal of the charge with prejudice, unless the error is harmless beyond a reasonable doubt. MCR 6.004(A); *Waclawski*, 286 Mich App at 664-665.

At the outset, we note that this issue does not involve the "180 day rule" although both the trial court and defendant, on appeal, make reference to the time period of 180 days since the charges against defendant were filed. The 180-day rule divests the trial court of jurisdiction if a defendant, while incarcerated in a state prison, is not brought to trial within 180 days after the prosecution receives notice that defendant is incarcerated. MCL 780.131(1). The rule does not apply to defendants incarcerated in county jail while awaiting trial. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). As it is undisputed that defendant was incarcerated in the Macomb County Jail, the rule does not apply. Nor is defendant's claim that prejudice to defendant is "presumed" if the prosecution does not commence a trial within 180 days accurate. Defendant's reference to *People v Pelkey*, 129 Mich App 325, 329; 342 NW2d 312 (1983) for this proposition is misplaced, because *Pelkey* in fact involved an inmate serving a prison sentence and therefore subject to MCL 780.131. *Id*. at 327-328.

[4] This Court notes that defendant did not ask the trial court to sever his cocaine possession trial from the trial for his sexual offenses, and does not press that argument on appeal. The offense of cocaine possession with intent to deliver was charged against defendant in KB's case.

Rather, defendant's claim for violation of his right to a speedy trial is a claim of violation of a state and federal constitutional right, which is also secured by statute and court rule. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A); *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). "[A] defendant's right to a speedy trial is not violated after a fixed number of days." *Williams*, 475 Mich at 261. Resolution of a claim of violation of the right to a speedy trial requires the trial court to weigh the conduct of the parties. Relevant factors include: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Vermont v Brillon*, 556 US 81; 129 S Ct 1283, 1290; 173 L Ed 2d 231 (2009); *Williams*, 475 Mich at 261-262.

Calculation of the delay period starts from the arrest of the defendant. *Williams*, 475 Mich at 261. A delay of six months is the minimum period that implicates speedy trial concerns. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059; 743 NW2d 912 (2008). Between six and eighteen months, a defendant must prove prejudice. *Waclawski*, 286 Mich App at 665. A delay of more than 18 months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecution. *Williams*, 475 Mich at 262. In assessing the reasons for the delay, each period of delay is examined and attributed to the prosecutor, the defendant, or neither party. *Walker*, 276 Mich App at 541-542.

Here, defendant was arrested on March 25, 2009. Defendant's speedy trial motion was decided by the trial court on September 13, 2010 and defendant's trial commenced on October 5, 2010. Thus, 559 days elapsed between arrest and trial. The 18-month benchmark was met on September 25, 2010—after the trial court's decision on defendant's motion. Thus, at the time of the trial court's decision, the burden was on defendant to prove prejudice. *Waclawski*, 286 Mich App at 665. However, the delay was presumptively prejudicial by the time trial commenced. *Id*.

We conclude that the trial court did not err in denying defendant's motion. Defendant moved for discovery on December 04, 2009; the motion was adjudicated on December 14, 2009. Time spent adjudicating defense motions is charged to defendant. *People v Gilmore*, 222 Mich App 442, 460-461; 564 NW2d 158 (1997). The trial court noted that on December 14, 2009, it granted defendant's request to obtain a computer/electronics expert and DNA expert. Although no adjournment appears to have been entered, the trial court concluded, and defense counsel agreed, that some period of time could be attributed to the defense in order to allow time for its expert to prepare (although no expert ultimately testified at trial). Further, this conclusion is supported by the fact that defendant requested to adjourn the next substantial event following this grant, the pretrial conference on January 13, 2010 until January 20, 2010.

Further, the original trial date of March 4, 2010 was adjourned by stipulation until May 11, 2010. Adjournments stipulated to by the defendant are attributable to the defendant. See *Gilmore*, 222 Mich App at 460-461, citing *People v Hammond*, 84 Mich App 60, 67; 269 NW2d 488 (1978). Thus, the bulk of the period between December 04, 2009 and May 11, 2010, 158 days, was attributable to the defendant.

The trial court also did not clearly err in discounting 60 of the remaining days from May 11, 2010 to the date of the motion hearing from attribution to the prosecution, and charging

the remaining days to the prosecution due to the unavailability of the investigating officer. The trial court appears to have credited the 60 days to scheduling delays and delays caused by the court system by making references like "if we had not been thinking that [the investigating officer] could come back" and stating that "I have to take responsibility for those." Scheduling delays and delays caused by the court system, although attributable to the prosecution, should be given a neutral tint and only minimal weight. *Williams*, 475 Mich at 263.

In sum, the trial court did not err in concluding that, although portions of the delay were attributable to the prosecution and court system, a significant portion of the delay was attributable to defendant by adjudication of defense motions and requested and stipulated-to adjournments (almost six months by this Court's count). Further, with respect to the prejudice factor, defendant only claims generally that he "lost witnesses" as a result of his incarceration, that he suffered natural loss of memory of events, and that he suffered anxiety and depression as a result of his incarceration. Defendant names no witnesses allegedly lost by this delay, and does not explain how these witnesses would have aided his defense. "General allegations of prejudice are insufficient to establish that a defendant was denied the right to a speedy trial." *Walker*, 276 Mich App at 544; *Gilmore*, 222 Mich App at 462. We therefore conclude that the trial court did not err in denying defendant's motion.

Defendant's trial commenced on October 5, 2010, approximately three weeks after the trial court's decision on defendant's motion to dismiss. By that point, as noted above, the 18 month benchmark had passed. However, defendant did not renew his request for dismissal based on violation of his right to a speedy trial. To the extent that defendant now argues that his right to a speedy trial was violated in the period between September 13, 2010 and October 5, 2010, such an argument is unpreserved and reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 765; 597 NW2d 130 (1999).

The time period between September 13 and October 5 was chiefly occupied with adjudication of defendant's motion to suppress certain reports and testimony. Thus, it appears that most, if not all, of the additional delay in defendant's trial was attributable to defendant. *Gilmore*, 222 Mich App at 460-461. Further, although the delay had become presumptively prejudicial to defendant, there is no basis for this Court to conclude that defendant was prejudiced by the delay when a large portion of the delay, including the portion between September 13 and October 5, was attributable to defendant.

Balancing the four factors set forth in *Williams*, 475 Mich at 261, we conclude that defendant's right to a speedy trial was not violated. The record demonstrates that a large portion of the delay was attributable to defendant. Defendant did not file a motion alleging that his right to a speedy trial was violated until approximately 16 months had passed since his arrest, and his trial commenced shortly after his motion was heard. Finally, no specific prejudice to his defense is alleged to have occurred.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant, in both his appellate brief and supplemental pro se brief, asserts that his trial counsel was ineffective in several respects. We find that defendant's trial counsel's performance was not below an objective standard of reasonableness, and that in any event

defendant cannot demonstrate that any deficient performance on the part of his counsel was outcome determinative.

Defendant asserts that his trial counsel was ineffective under both *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), and *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052, 2064-2065, 2068; 80 L Ed 2d 674, 693-694, 698 (1984). The *Cronic* standard applies in certain narrow instances where circumstances are so likely to prejudice the defendant that no showing of prejudice is required, including a complete denial of counsel or an entire failure to subject the prosecutor's case to meaningful adversarial testing. *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843, 1851; 152 L Ed 2d 914, 927-928 (2002); *Cronic*, 466 US at 659. The *Strickland* standard applies generally and requires a defendant to demonstrate that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 US at 688.

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show a reasonable probability that his counsel's deficient performance was outcome-determinative. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Defendant moved this Court to remand for a *Ginther*[5] hearing on his trial counsel's ineffectiveness. This Court denied defendant's motion. *People v Alexander*, unpublished order of the Court of Appeals, issued July 14, 2011 (Docket Nos. 302026, 302038, 302045). Our review of this issue is therefore limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

In his main appellate brief, defendant asserts that his counsel was ineffective in failing to investigate, consult with, and/or obtain an expert witness on the subject of forensic interviews and child sexual abuse victims and perpetrators, and failing to meaningfully cross-examine prosecution witnesses about these matters.

The bulk of defendant's argument in his main brief concerns his trial counsel's alleged failure to consult with and/or retain an expert witness on child psychology and forensic interviewing.[6] With regard to forensic interviewing, defendant alleges that his counsel failed to

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

[6] Michigan's forensic interviewing protocol is a set of interviewing procedures designed to investigate child abuse and sexual abuse while minimizing the risk of manipulation by the interviewer. See Russell, *Documentation and Assessment of Children's Forensic Interview Statements*, 16 Widener L Rev 305, 307 n 8 (2010).

educate himself through consultation with an expert and failed to meaningfully cross-examine prosecution witnesses concerning forensic interviewing protocols and whether they were conducted in accordance with established procedures. Defendant also alleges that his counsel failed to produce expert witnesses to discuss forensic interviewing and how it can be used to influence children's testimony.

The victims in this case testified in open court about defendant's sexual abuse. The content of any forensic interviews was not admitted into evidence, nor did prosecution experts testify at length about forensic interviewing. Unlike the case upon which defendant relies, *People v Owens*, unpublished opinion per curiam of the Court of Appeals, decided November 2, 2010 (Docket No. 288074),[7] the prosecution in this case did not make the "forceful argument" that the victims could not have been coached because they underwent the forensic interview process. Unpub op at 3. Further, reference to forensic interviewing was not, as it was in *Owens*, used bolster the credibility of the victim. *Id*. at 4. Instead, here, to the extent that forensic interviewing was even mentioned at trial, it was merely mentioned as part of the police investigation and as leading to the addition of TH's charges against defendant.

Defense counsel's performance can be ineffective when counsel fails to investigate a defense, including failure to consult with expert witnesses. See *People v Trakhtenberg*, 493 Mich 38, 54-55; 826 NW2d 136 (2012). However, failure to interview witnesses alone does not establish inadequate investigation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Rather, the failure to investigate or call witnesses constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, the record reflects that AH and TH volunteered their allegations to caregivers, and did not initially make them in the context of a forensic interview or indeed while being questioned at all. As for KB, she was questioned by her mother concerning the events of the weekend she spent with defendant. Defense counsel thoroughly cross-examined the victims about their allegations, and they provided detailed and consistent answers. No attempt was made by the prosecution to buttress their credibility through testimony of a forensic interviewer or reference to the forensic interviewing process. Unlike the defense counsel in *Owens*, defendant's counsel did not display a "disturbing" lack of knowledge of the question of child sexual abuse victims. Unpub op at 2. For example, defense counsel questioned AH about whether she felt mistreated by defendant because she didn't receive as many privileges as the other children in the house as well as whether she had heard allegations from anyone else about defendant including whether she had spoken to any of the other victims about defendant's abuse. Defense counsel further attempted to impeach AH regarding a period of time where she attempted to recant her allegations to a police detective, and argued in closing argument that AH had been led to believe that recanting her story would get her in legal trouble. Counsel also cross-examined all the victims about possible influences to their testimony, and argued that the victims behaved inconsistently toward defendant following his arrest.

[7] Unpublished cases are not binding on this Court. MCR 7.215(C)(1).

As for the professional witnesses, defense counsel elicited testimony regarding a mix-up in DNA samples sent to the lab, as well as testimony that SH had never been tested to be excluded from the DNA results, and that the partial profile of AH was matched at only 8 locations. Defense counsel also argued that the prosecution did not present evidence that the victims were suffering from typical reactions to sexual abuse and had not seen a counselor or psychologist. In so doing, counsel displayed an awareness of the issues involved with child sexual abuse victims and their testimony, rather than displaying the "disturbing" lack of awareness of these issues displayed by defense counsel in *Owens*. *Owens*, Unpub op at 2.

While defense counsel arguably could have presented expert testimony on how children's testimony regarding sexual abuse may be influenced by the adults around them, we are not convinced that counsel's failure to do so rendered his performance below an objective standard of reasonableness, especially in light of his extensive cross-examination of the victims. We do not measure trial counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009).

Further, defendant cannot show that any failure on the part of defense counsel to retain or call expert witnesses was outcome-determinative. As stated above, counsel engaged in extensive cross-examination of the victims and professional witnesses, and was successful at raising issues such as the mishandling of DNA evidence and the victims' post-abuse behavior toward defendant. All three of the victims testified clearly and precisely about defendant's sexual abuse; moreover, the record does not contain evidence that would support an inference that all three of the victims were coached or coerced to provide such testimony. The testimony of an expert witness on possible influences on the victim's testimony would not have been reasonably likely to result in a jury concluding that all three of these victims were lying. As the victim's testimony alone is sufficient to result in conviction, *Davis*, 241 Mich App at 700; MCL 750.520h, we conclude that defendant additionally cannot demonstrate prejudice under the *Strickland* standard.

As for the *Cronic* standard, we find no support in the record for the conclusion that defense counsel's performance resulted in an entire failure to subject the prosecutor's case to meaningful adversarial testing. *Cronic*, 466 US at 659. As stated above, defendant in fact subjected all of the prosecution's witnesses to extensive cross-examination, and displayed at least an adequate understanding of the issues involved in defending cases of this type. Defendant's citation to *People v Gioglio*, 292 Mich App 173; 807 NW2d 372 (2011), does not aid his argument that the *Cronic* standard applies to defense counsel's performance in this case, because it was reversed by our Supreme Court on precisely that issue. *People v Gioglio*, 490 Mich 868; 802 NW2d 612 (2011). Further, *Cronic* recognizes that a defendant has not been denied the effective assistance of counsel merely because counsel makes "demonstrable errors" but rather only if "the process loses its character as a confrontation between adversaries . . . ." *Cronic*, 466 at US 656. Such concerns are not implicated here.[8]

[8] In any event, in *Gioglio*, defense counsel failed to present any witnesses or evidence, failed entirely to cross-examine important witnesses, and failed to object to the introduction of hearsay testimony and propensity evidence. *Gioglio*, 292 Mich App at 26-28. Nonetheless, on remand

Defendant additionally argues that his counsel's cross-examination was not only ineffectual, but actually damaging, and refers to two instances: first, counsel's cross-examination of KB concerning whether she had ever seen defendant nude; and second, counsel's cross-examination of Miller. These cross-examinations, alleges defendant, "opened the door" to the introduction of evidence that KB saw defendant nude at the hotel during the alleged photo shoot trip, and evidence that the pornographic videos depicted underage girls. Although these questions may have been ill-advised, we do not find that defendant can demonstrate that they were outcome-determinative. Specifically, although defense counsel's question opened the door for the introduction of naked photos of defendant that KB alleged defendant asked her to take, none of the charges against defendant concerned his conduct in allegedly asking her to take those pictures. Thus, absent that evidence, defendant cannot demonstrate a reasonable probability that the outcome of his trial would have been different. *Armstrong*, 490 Mich at 289-290. As for counsel's cross-examination of Miller, while it did allow the introduction of the names of the videos, the videos were also played for the jury. Defense counsel also put forth the argument, supported by defendant's testimony, that either other persons downloaded the files, or that defendant downloaded the files without reading the names (Tr VII 127-129, 164). Therefore, even absent evidence of the names of the video files, defendant cannot demonstrate a reasonable probability that the outcome of his trial would have been different. *Id*.

In his pro se brief, defendant repeats many of these allegations. Defendant also argues that his counsel was deficient for failing to visit "the girls'"[9] school, obtain his bank accounts, hire a private investigator, and "conduct an evidentiary hearing." Defendant does not explain how any of these alleged failures prejudiced his defense or fell below an objective standard of reasonableness. We afford defense counsel wide discretion in matters of trial strategy and strategic judgments. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003); *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

Further, defendant claims that his counsel failed to engage a computer expert, but does not elaborate on how a computer expert would have aided his defense and provides no proof that an expert witness would have testified in his favor. Defendant thus has not established the factual predicate for his claim of ineffective assistance. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also charges numerous deficiencies in his trial counsel's cross-examination of the victims. The questioning of witnesses is presumed to be a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212, lv den 482 Mich 1033 (2008). Counsel in fact addressed many of the issues raised by defendant, including the issue of inconsistencies in the victim's testimony between the preliminary examination and trial. We find no basis for concluding that defendant was denied the effective assistance of counsel by his counsel's performance at cross-examination, as described more fully above.

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following an evidentiary hearing, this Court satisfied itself that even these actions did not amount to ineffective assistance of counsel under *Strickland*. *People v Gioglio (On Remand)*, 296 Mich App 12, 28; 815 NW2d 589, rev'd and rem'd in part on other ground 493 Mich 864 (2012).

[9] It is unclear to which victims defendant is referring.

Finally, much of defendant's brief alleges conduct that he deems unfair or illegal on the part of the arresting officer, delays in receiving a discovery packet from the prosecution, disorganization on the part of his defense counsel, failure of his defense counsel to demand a bench trial, and inadequate representation at his preliminary exam. Defendant has not established the factual predicate for these claims, *Ackerman*, 257 Mich App at 455, and has not demonstrated that, if true, they were outcome determinative, *Armstrong*, 490 Mich at 289-290.

We conclude that defendant was not denied the effective assistance of counsel.

VI. EVIDENTIARY ISSUES

Next, defendant argues that the trial court erred in admitting prejudicial evidence against defendant, and failing to admit evidence favorable to defendant. We review a trial court's decision to admit evidence for abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). Preliminary questions of admissibility based upon construction of rules of evidence are reviewed de novo. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

Defendant argues that the trial court erred in admitting evidence related to him appearing nude in front of KB at the hotel; in admitting the names of the video files on his computer and allowing the videos to be played for the jury; and in admitting statements made to a detective during a pre-interview for a polygraph examination. Defendant additionally argues that the trial court erred in refusing to admit testimony that defendant had a normal adult relationship with SH and had an aversion to oral sex.

As for evidence of defendant appearing nude in front of KB at the hotel, this evidence was offered in response to defense counsel's question to KB as to whether she had seen defendant nude. KB agreed with defense counsel that defendant was wearing a pair of boxer shorts when he sexually abused her at his home. The prosecution then offered evidence, in the form of testimony and pictures, that defendant had appeared naked before KB at the hotel and asked her to take pictures of him touching his penis. The evidence was thus relevant to the issue, raised by defense counsel, of whether KB had ever seen defendant nude. MRE 402; *People v Murphy* (*On Remand*), 282 Mich App 571, 580; 766 NW2d 303 (2009). Further, this evidence's probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010). "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod, rem'd 450 Mich 1212 (1995). Rather, undue prejudice results when there is a tendency that the evidence will be given undue or preemptive weight by the jury. *Murphy*, 450 Mich at 75-76. It is doubtful that the jury gave evidence that defendant asked KB to take naked pictures of him undue or preemptive weight, in light of her other testimony concerning his sexual abuse.

Additionally, masturbating in the presence of minors is an act of gross indecency. See MCL 750.338b; *People v Lino*, 447 Mich 567, 578; 527 NW2d 434 (1994). MCL 768.27a allows the admission of other uncharged sexual acts involving minors for any purpose for which

it is relevant.[10] *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). "[A] full and complete picture of a defendant's history will tend to shed light on the likelihood that a given crime was committed." *Id*. at 620. Therefore, the evidence was properly admissible under this statute, as well as under the general rules of evidence.

As for the admission of the names of the video files, the admission was brought about by defense counsel's question as to whether the names of the videos meant anything. The names given to the files were thus relevant to the issue of whether defendant could deduce the content of the videos from the filenames prior to downloading. MRE 402; *Murphy* (*On Remand*), 282 Mich App at 580. Although damaging to defendant, the admission of the titles was not unfairly prejudicial, especially in light of defense counsel's solicitation of testimony from the computer expert that filenames could have no relation to what the actual content of the videos were, and the fact that jury was able to view the videos for itself. *Murphy*, 450 Mich at 75-76.

As for the admissions of defendant's statements in the polygraph pre-interview, the trial court was conscientious in limiting the scope of the testimony to avoid mention of the polygraph or any of defendant's answers to polygraph questions. Defendant also signed an advice of *Miranda* rights form and a consent form. Although defendant makes reference on appeal to an "agreement" that none of his statements would be admitted, it appears from the record that defendant requested that no post-test interview be performed; and indeed no such interview was performed. The trial court properly concluded that defendant's statements were admissible as admissions of a party-opponent. MRE 801(d)(2); *People v Herndon*, 246 Mich 371,400-401; 633 NW2d 376 (2001). Further, the statements attributed to defendant were not inculpatory, but were similar to statements defendant made at trial in his defense. Thus, even assuming the statements were admitted in error, such error did not prejudice defendant and was harmless. *People v Snyder*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 6.

Finally, the trial court's denial of the admission of evidence that defendant had a sexual relationship with SH and did not enjoy oral sex was moot, because SH testified that she had sexual relations with defendant as recently as three days before his arrest, and testified that defendant did not perform oral sex on her. Although evidence that defendant had a sexual relationship with an adult woman may have had some relevance, the trial court is permitted to exclude evidence that is needlessly cumulative. MRE 403; *People v Yost*, 278 Mich App 341, 407; 749 NW2d 753 (2008).

VII. CUMULATIVE ERROR

Finally, defendant alleges that the cumulative effect of the trial court's errors deprived him of a fair trial. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict

[10] Gross indecency between a male and a female, committed against a person under 13 years of age, is a Tier III offense, MCL 28.722(w)(*i*), and is thus a "listed offense," evidence of which is admissible under MCL 768.27a.

before a new trial is granted." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007), habeas corpus den *Dobek v Berghuis*, 474 Fed Appx 447 (2012). As discussed *supra*, we do not find any individual errors warranting reversal. Additionally, we do not find the sort of accumulation of individually harmless errors that collectively undermines confidence in the reliability of the jury verdict. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark T. Boonstra