STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2013
v	No. 305440 Antrim Circuit Court
JEFFREY LANCE ADAMS, Defendant-Appellant.	LC No. 11-004405-FH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of criminal sexual conduct, second-degree (CSC II), MCL 750.520c(1)(a) (person under 13 years of age). The trial court sentenced him to prison for 24 to 180 months. On appeal, defendant moved for a remand for an evidentiary hearing pertaining to various issues. On February 23, 2012, this Court granted, in part, the motion to remand. This Court directed the trial court to conduct an evidentiary hearing and to entertain a motion for a new trial based on defendant's argument that the prosecutor used an improper leading gesture. This Court also directed the trial court to allow defendant to bring a motion for resentencing. On remand, the trial court held an evidentiary hearing regarding the alleged improper gesture and reconsidered defendant's sentencing. The trial court denied defendant's motion for a new trial and affirmed his sentence. After reviewing these and other issues raised by defendant, we affirm.

Defendant's convictions arise from an incident involving a 12-year-old friend of his daughter. The victim was staying at defendant's house for a sleepover before going to an adventure camp. Around midnight, the victim was awakened by defendant rubbing her genital area. The victim testified that defendant was touching her under the blankets but on top of her pajamas. The victim also said that defendant squeezed each of her inner thighs.

The victim testified that she fell back asleep and went to the adventure camp with defendant's daughter the next day. The victim then spent the next night at defendant's home as well, but she said that nothing else happened. The victim said she did not tell anyone until the next Monday at school, when she told two of her friends. The victim's friends encouraged her to tell the guidance counselor, and the victim went to the guidance counselor the next day and disclosed what happened. The jury convicted defendant of CSC II and this appeal followed.

Defendant argues that the prosecutor committed many instances of misconduct that deprived him of a fair trial. We disagree.

We are precluded from reviewing prosecutorial misconduct "unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (internal quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are therefore reviewed for plain, outcome-determinative error. *Id*. at 235; see also *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Unger*, 278 Mich App at 235 (internal quotation marks and citation omitted).

A preserved, nonconstitutional claim of prosecutorial misconduct is only grounds for reversal if it is more probable than not that the error was outcome-determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). The defendant bears the burden of proving that the error was outcome-determinative. See, e.g., *Brown*, 279 Mich App at 134. Here, the only instance of alleged prosecutorial misconduct that defendant adequately preserved involved the allegedly improper leading gesture.

A prosecutor has a duty to ensure justice, which is not just the conviction of the guilty. *People v Jones*, 468 Mich 345, 354; 622 NW2d 376 (2003). Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments must be considered as a whole and must be viewed in light of defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Generally, prosecutors have great latitude in their arguments and conduct and are free to argue any reasonable inference that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 792 NW2d 53 (1995). When arguing the inferences, a prosecutor does not have to use the blandest terms available. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Opening statement is the proper time for the prosecutor to comment on the evidence that will be presented. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). If the prosecutor makes a comment during opening statements that certain evidence will be presented but the evidence is not presented, reversal will only be warranted if the prosecutor did not act in good faith. *Id*.

A prosecutor may not make statements of fact that are not supported by the evidence. *People v Ericksen*, 288 Mich App 192, 199; 793 NW2d 120 (2010). In addition, although a prosecutor cannot directly vouch for the credibility of a witness, the prosecutor may argue from the evidence whether a particular witness is worthy or not worthy of belief. See, generally, *Bahoda*, 448 Mich at 276, and *Dobek*, 274 Mich App at 66.

Defendant argues that the prosecutor committed misconduct by asking leading questions. However, defendant fails to acknowledge that leading questions are sometimes permissible. MRE 611(d)(1) indicates that leading questions are permissible on direct examination "as necessary to develop . . . testimony." Also, a prosecutor generally has considerable leeway with leading questions when the witness is a child. *People v Watson*, 245 Mich App 572, 587; 629

NW2d 411 (2001). Further, a prosecutor's use of leading questions is not an automatic basis for reversal; instead, "it is necessary to show some prejudice or pattern of eliciting inadmissible testimony." *Id.* (internal quotation marks and citation omitted).

The questions defendant specifically identifies on appeal as leading were either not leading or were asked of the 13-year-old victim. In regard to the victim's clothing, the prosecutor asked the victim's mother:

> *Q.* Okay. Okay. Anything unusual about her clothes from that weekend when she was—when she went and came back from the sleepover?
>
> *A.* She wears baggy clothes now.
>
> *Q.* You know what happened with those clothes, did you wash them and put them away?
>
> *A.* We burnt them.

The initial question was not leading, because a leading question tends to suggest the answer. Subsequently, the prosecutor was merely inquiring what became of the clothes and was attempting to clarify the previous question, which had been misunderstood.

The other specific examples defendant points out were questions that were asked of the victim. Not only does the prosecutor have substantial leeway with child witnesses, but a review of the record reveals that the victim was nervous and many times asked for clarification or did not appear to understand the questions. Additionally, the victim revealed, after she was excused from the stand, that defendant's daughter and defendant's mother had been outside the courtroom staring in at the victim and making her nervous during her testimony. From the context of the testimony, it appears that the prosecutor was attempting to develop the victim's testimony. This was acceptable because the victim was a child witness who was admittedly nervous and anxious.

Defendant has failed to demonstrate any prejudice or pattern of eliciting inadmissible testimony in connection with his argument. *Id*. Additionally, some of the questions defendant takes issue with were not leading at all. We find no prosecutorial misconduct.

Defendant also argues that the prosecutor made an improper leading gesture. Defendant argues that the prosecutor made the gesture in front of the victim, thereby prompting the victim to repeat the gesture.

At trial, during the victim's testimony, the prosecutor asked:

> *Q.* You say he was touching you on your crotch, how was he doing that? What kind of touch?
>
> *A.* I'm sorry, I don't understand that.
>
> *Q.* What kind of touch was it, when you said he was touching you. We just want—the jury needs to understand what it was that was happening?

THE COURT: Would it be easier for you to show them? Can you duplicate the movement?

Q. Okay. That would be good, show us.

A. He was going like that.

Q. You are showing with one finger and he was making a circular motion?

A. (Nods head).

Defendant maintains that the prosecutor made the motion before the victim did, and, as noted, moved for a remand for an evidentiary hearing, which this Court granted. On remand, the trial court clarified that the scope of the proceedings would be an evidentiary hearing concerning the gesture. At the hearing, several witnesses testified on behalf of defendant and said that they saw the prosecutor make the gesture before the victim did. The trial prosecutor, Erin House, also testified and said that she did make the gesture, but after the victim did. House stated:

> [The victim] became sort of quiet when I was asking her to tell us what happened. Then the Court gave her an instruction that said, could you demonstrate for us what happened, maybe as opposed to saying it out loud.
>
> She demonstrated to the jury what that motion was. And then I, as the Prosecutor, made what we would call a record on appeal, where I then verbally stated what she had done. And my habit and experience is, that I make the motion at the same time that I orally describe it.

None of defendant's witnesses remembered the trial court asking the victim to demonstrate the motion.

The trial court made its ruling on the record and indicated that perception and reality often vary and that is why there is a record. The trial court also pointed out that none of the witnesses challenged the accuracy of the record. The trial court then found that the record was clear regarding what had occurred and found that the prosecutor had made the gesture after the witness did.

Defendant's position, after remand, is that the trial court erred in not granting a new trial because there was evidence that the prosecutor made the gesture before the victim did. Defendant supports his position with the affidavits provided by his witnesses at the remand hearing. The trial court was able to review the affidavits and judge the credibility of each of the witnesses. We must be respectful of the trial court's role in determining the credibility of witnesses and we must defer to the trial court's findings, especially where witness credibility is involved. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004); *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). The trial court determined that the record was the best indication of what occurred and found that there was no misconduct because the prosecutor was merely verbalizing the motion that the victim had made for the record.

The trial court's finding is consistent with the record, and we give deference to that finding. There was no prosecutorial misconduct, and the trial court did not err in denying the motion for a new trial.

Defendant also argues that the prosecutor committed misconduct by allowing false testimony to be presented. Defendant argues that the prosecutor encouraged the victim to say that defendant touched her with one finger, when the victim had reported in her forensic interview that defendant had touched her with four fingers.

A prosecutor may not knowingly allow the admission of false testimony, and the prosecutor has a duty to correct any false testimony admitted. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Here, defendant has failed to demonstrate that there was false testimony, and therefore there was no misconduct or plain error. *Brown*, 279 Mich App at 134.

The prosecutor never asked the victim how many fingers defendant used when he touched her. Instead, the prosecutor attempted to get the victim to demonstrate the manner of touch—and the trial court itself, during the colloquy, asked the victim about "the movement" employed. Defendant maintains that the victim's using one finger to demonstrate the manner of touch was false testimony. However, a variation in the number of fingers employed does not change the pertinent information that was being sought, i.e., the movement used by defendant during the incident. Defendant has failed to demonstrate that there was false testimony because the victim was not testifying about how many fingers defendant used and was instead indicating the manner of touch used.

Next, defendant argues that the prosecutor committed misconduct by bolstering the credibility of the victim directly and through the victim's mother.

A prosecutor may not directly "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, 448 Mich at 276. However, as noted, the prosecutor may argue from the evidence whether a particular witness is worthy or not worthy of belief. See *Dobek*, 274 Mich App at 66.

The prosecutor, in her closing argument, summarized the victim's testimony and pointed out evidence that would tend to show credibility. For example, the prosecutor discussed the victim's demonstration of the manner of touch and argued that a young child would not know what the rubbing motion meant unless it had happened. The prosecutor also recounted the victim's demeanor throughout her testimony. The prosecutor said, "So you have her word and you got to watch her and see her and hear her talk about this, and you can know from that she's telling the truth and the defendant is guilty." Although the prosecutor said "she's telling the truth" or made similar statements a few times, in context with the rest of the argument, this was not improper bolstering. The prosecutor never hinted to the jury that the prosecutor had special knowledge of the victim's truthfulness. *Bahoda*, 448 Mich at 276. Instead, the prosecutor used the evidence presented throughout the trial to argue why the jury should determine that the victim was worthy of belief. *Dobek*, 274 Mich App at 66.

Also, the prosecutor's argument that the victim was worthy of belief was responsive to defense counsel's arguments. During cross-examination of the victim, defense counsel was able

to impeach the victim's credibility by pointing out inconsistent testimony between the preliminary examination and trial. Defense counsel also provided testimony to question the victim's story, such as her falling back asleep after the incident, with defendant sitting just a few feet away. Counsel also noted that the victim slept well the remainder of that night and the following night when she stayed at defendant's house again. Defense counsel was also able to establish that defendant never threatened or talked to the victim about the incident. In light of these examples, as well as other cross-examination tactics, the prosecutor's argument that the victim was worthy of belief was responsive to defendant's arguments. *Brown*, 279 Mich App at 135.

The prosecutor also did not bolster the victim's credibility through the testimony of the victim's mother.[1] Although the prosecutor may have been attempting to elicit the victim's mother's opinion concerning whether the victim was telling the truth, the prosecutor was unsuccessful. Defense counsel successfully objected each time the prosecutor attempted to question the mother about whether the victim was telling the truth, and the victim's mother never directly testified about her opinion of the victim's credibility. There was no misconduct because defense counsel successfully objected and stopped the challenged testimony.

Defendant also argues that the prosecutor committed misconduct during voir dire. Defendant argues that the prosecutor implied that defendant was guilty and biased the jury against defendant by stating:

> And, a few of you said you knew Mr. Hickman [defense counsel] from seeing him represent someone on a prior Court case, okay. You understand that's my job and his job and that isn't necessarily a reflection on how he feels one way or another about a case but he's doing his job and every defendant has the right to have an attorney?

Comments made by the prosecutor must be considered as a whole. *Brown*, 279 Mich App at 135. The purpose of voir dire is to eliminate from the jury anyone who is unable to remain fair and objective. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The potential jurors are questioned to uncover any bias they may have that could make them impartial. *Id*.

The prosecutor was attempting to find out if any of the prospective jurors were prejudiced by any interactions with defense counsel. The prosecutor's questions before and after the comment at issue all dealt with determining whether any jurors had bias based on their personal relationships or interactions with the legal system. Considering the context of the statement, it does not appear that the prosecutor was commenting at all on defendant's innocence or guilt, but was instead attempting to determine bias. Further, the trial court instructed the jury twice that statements and arguments made by either attorney were not evidence but merely reflected how each side perceived the case. Jurors are presumed to follow their instructions and most errors are presumed to be cured by appropriate instructions. *People v Bauder*, 269 Mich App 174, 195;

[1] Defendant argues that "[the victim's] veracity was further improperly bolstered by the inference that her mother found her to be truthful."

712 NW2d 506 (2005). Although the prosecutor's voir dire comment was not erroneous, any prejudice caused by the comment was presumptively cured by the trial court's instruction to the jury to not consider comments and arguments of the attorneys as evidence.

Defendant's final argument regarding prosecutorial misconduct is that the prosecutor mischaracterized the evidence and made arguments unsupported by the evidence.

During opening statement, the prosecutor referred to defendant and his behavior as "creepy." Defendant's argument revolves around the idea that the prosecutor's comments did not match up word-for-word with the victim's testimony. For example, the victim never called defendant creepy and instead said certain things made her uncomfortable, like defendant's watching her put on makeup. Also, the victim said defendant's tickling was awkward and made her feel uncomfortable, not "funny" as stated by the prosecutor. However, the prosecutor was free to argue reasonable inferences from the evidence and did not have to use the blandest possible terms to do so. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66.

The prosecutor's characterization of defendant's behavior was the prosecutor's interpretation of the evidence to be presented. Moreover, the prosecutor's statements were adequately supported by the victim's testimony. During opening statement, the prosecutor could only tell the jury what she thought would be presented at trial and had no way of knowing the exact language a witness would use. The prosecutor was not required to say that the victim was uncomfortable in plain, bland terms and did not mischaracterize the testimony by using a colorful adjective like "creepy" or by inferring that defendant liked to watch girls "get dressed and get ready."

Defendant also argues that the prosecutor's argument about the victim's emotions the morning following the incident was not supported by the victim's testimony. The prosecutor said that the victim was confused and scared the next morning. The victim testified that she felt sad the next day and called her mom hoping she would be told to come home. The victim also testified that she did not tell anyone at adventure camp what happened because she did not know them. Again, the evidence supported the prosecutor's argument and characterization that the victim was scared and confused. The prosecutor simply used different terms to summarize the testimony that was expected. None of the prosecutor's comments, characterizations, or arguments were improper, and defendant has failed to demonstrate any error affecting his substantial rights. *Brown*, 279 Mich App at 134.

Next, defendant argues that he was denied effective assistance of counsel on several grounds. First, defendant argues that counsel was ineffective for failing to consult and call an expert witness at trial.

An ineffective-assistance claim has a mixed standard of review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error and reviews de novo questions of constitutional law. *Id*. Effective assistance is presumed, and the defendant carries the burden of proving otherwise. *Id*. at 578. To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below professional norms and (2) that but for counsel's ineffectiveness, the ultimate result would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713

(2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel has wide discretion in matters of trial strategy, including decisions regarding whether to call or question witnesses and whether to present certain evidence. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In general, the failure to call a particular witness will constitute ineffective assistance of counsel only when the failure would deprive the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that may have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). This Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy. *Payne*, 285 Mich App at 190. This Court will also not judge counsel's competence with the advantage of hindsight. *Id.*

Defendant argues that an expert witness in the area of forensic interviewing was necessary for his defense. Defendant maintains that counsel was ineffective for failing to consult or retain an expert to attack the victim's forensic interview and credibility. However, defendant does not offer any proof of what an expert witness would have testified to at trial that would be helpful to his defense. Defendant spends a great deal of time discussing forensic interviewing and the protocol associated with it. Defendant also cites numerous studies dealing with the problems of interviewing children. However, none of the cited material or discussion focuses on what an actual expert would have offered as testimony *in this case*. Defendant mentions possible weaknesses in the forensic protocol used in this case, but does not provide the substance of what a proposed expert would have said about the protocol used. Again, this Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy. *Id.* Because defendant has failed to demonstrate that an expert was necessary, defendant has not met his burden of demonstrating ineffective assistance.

Defendant also argues that counsel was ineffective in failing to impeach the victim. We disagree. Counsel did impeach the victim with inconsistent testimony. Additionally, defense counsel cross-examined the victim extensively about a statement that the incident could have been a dream. A decision regarding what questions to ask a witness involves trial strategy, *Horn*, 279 Mich App at 39, and defense counsel did ask questions that impeached the victim's credibility. Counsel was not ineffective merely because defendant would have impeached in a different manner.

Defendant argues that counsel was ineffective for failing to properly investigate and call various witnesses. We disagree. Defendant argues that he was willing to testify at trial but that his attorney talked him out of it. However, defendant cannot claim error in not testifying because at trial he explicitly waived his right to testify. Defendant also argues that counsel failed to call a particular witness, the mother of one of the persons to whom the victim reported the touching. However, defendant has not demonstrated that the witness would have been helpful to defendant's case or even that her testimony would have been admissible. See, e.g., MRE 701 (discussing opinion testimony by lay witnesses). Defendant has failed to overcome the presumption of effective assistance with regard to this potential witness.

Defendant also argues that counsel failed to properly investigate the case and prepare for trial. Defendant's position is that an expert was necessary to investigate the case; however, as already discussed, defendant has failed to indicate how an expert would have aided his defense. Defendant also argues that counsel was ineffective because he was not properly prepared for trial. Defendant's position in this regard is that counsel's alleged failure to adequately cross-examine and develop the inconsistencies in testimony was a result of improper preparation. Additionally, defendant asserts that "[w]itness list dates were missed and counsel failed to prepare his witnesses or himself for a jury." However, defendant's argument is not supported by citation to the record. A party cannot leave it to this Court to '"discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because defendant failed to develop his argument or cite to the record to support his position, he has not met his appellate burden.

Defendant also argues that counsel was ineffective for failing to conduct adequate voir dire and allowing biased jurors to be impaneled. We disagree. Defendant does not indicate which jurors were biased or what questions counsel should have asked. Again, a party cannot leave it to this Court to '"discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Kevorkian*, 248 Mich App at 389, quoting *Mitcham*, 355 Mich at 203. Defendant has failed to properly assert his position, and this Court does not have to try and unravel which jurors defendant maintains were biased or how counsel should have conducted voir dire differently. Also, a review of the record indicates that a great deal of time was spent on the idea that a child victim's testimony alone could be used to convict. Most of the jurors that were questioned specifically indicated that they would have to see how the child witness presented before making any credibility determinations but that they understood that if the child was believable, her testimony alone would be enough to convict. This was not improper. It does not appear from the record that any juror was actually biased, and again, defendant does not provide a specific indication regarding which jurors he believes were biased. It is defendant's role to overcome the presumption of effective assistance, and defendant has not done so.

Defendant's final argument concerning ineffective assistance is that counsel was ineffective for failing to object to the scoring of offense variable (OV) 10 and OV 12 or to the instances of claimed prosecutorial misconduct. As already discussed, there was no prosecutorial misconduct, and counsel was not ineffective for failing to make futile objections. *Ericksen*, 288 Mich App at 201. Additionally, as addressed below, the trial court did not err in its OV scoring. Therefore, counsel was not required to object. *Id.*

Next, defendant argues that the cumulative effect of the alleged errors throughout the trial deprived him of due process and the right to a fair trial. We disagree.

Even if the effect of one error does not warrant reversal, the cumulative effect of several errors can. *Dobek*, 274 Mich App at 106. To warrant reversal, the errors must "undermine the confidence in the reliability of the verdict . . . ." *Id.* Further, absent any error, there can be no cumulative effect that would necessitate reversal. *Id.* None of the alleged errors in this case amounted to any actual error. Accordingly, reversal is unwarranted.

Finally, defendant argues that the trial court erred in scoring OV 9, OV 10, and OV 12. We disagree.

We review de novo the application of the sentencing guidelines. *People v Bulger*, 291 Mich App 1, 4; 804 NW2d 341 (2010). However, the trial court's findings of fact are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The trial court must read the sentencing guideline statutes as a whole when determining how many points to assess for each OV. *People v Bonilla-Machado*, 489 Mich 412, 422; 803 NW2d 217 (2011). When interpreting statutes, the best indicators of legislative intent are the words used, and they "should be interpreted on the basis of their ordinary meaning and the context within which they are used . . . ." *Id.* at 421-422. The trial court has discretion to determine the number of points that are appropriate for each OV, as long as there is evidence on the record supporting the score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). In general, scoring decisions with any evidence in support will be upheld. *Id.*

Defendant argues that the trial court erred in scoring OV 9 at 10 points because there was only one victim and no one else was placed in danger of injury or loss of life.

MCL 777.39(1)(c) indicates that OV 9 is properly scored at 10 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss[.]" When considering whether there were other victims, the trial court should only consider those people who were placed in danger of physical injury or loss of life. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008).

At sentencing, the trial court justified the scoring of OV 9 as follows:

> And let there be no mistake, a CSC 2nd is a physical assault. It is a specialized form of sexual assault. It's sexual, as opposed to a touching for purposes of causing physical damage or physical harm. With regard to scoring OV 9, any other child that is in close proximity, is in danger of not necessarily being sexually assaulted, but being assaulted in some fashion.
>
> Anyone who is discovered in the course of completing a crime, there's always a risk that anyone who see's [sic] it, witnesses it, bystander, will be implicated in some negative and deleterious fashion. . . .

The trial court reconsidered this issue on remand and upheld its previous decision.

The trial court did not err in scoring OV 9 at 10 points. At the time of the incident, both girls were asleep and within feet of each other. Both girls were in danger of being molested by defendant; indeed, because he had access to both girls, he had his choice of which child to victimize. See, e.g., *Waclawski*, 286 Mich App at 684.[2] Defendant states that there was no

[2] We find *People v Phelps*, 288 Mich App 123, 126; 791 NW2d 732 (2010), distinguishable because in *Phelps*, the criminal encounter between the defendant and the victim had started out as mutual, consensual activity, making it unlikely that the defendant would target the other

evidence that defendant's daughter had ever been a victim of her father; however, that does not change the fact that defendant could have chosen to victimize his own daughter. Also, if defendant had chosen to victimize his daughter instead, physical injury was a possible risk. In addition, the daughter was in danger for the reason stated by the trial court—she may have been harmed if she had awoken and seen the assault in progress. In light of the factual circumstances, in light of the *Waclawski* case, and in light of the standard of review, we cannot find that the trial court erred in scoring OV 9 at 10 points.

Defendant also argues that the trial court erred in scoring OV 10 because defendant did not exploit the victim based on her youth. MCL 777.40(1)(b) provides that OV 10 is properly assessed 10 points when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" Five points are appropriate when "[t]he offender exploited . . . a victim who was intoxicated, under the influence of drugs, asleep, or unconscious[.]" MCL 777.40(1)(c). The statute defines "[e]xploit" as "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). Vulnerability is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). In *People v Johnson*, 474 Mich 96, 103; 769 NW2d 256 (2006), the defendant was 20 years old and the victim was 15 years old. The Michigan Supreme Court upheld the score based on the defendant's exploitation of the victim's youth. *Id*.

Defendant argues that only the fact that the victim was sleeping, not the victim's youth, justifies the scoring of OV 10. We disagree. The trial court did not err in determining that defendant exploited the victim's youth. The victim was a young child, asleep in the home of a friend. Not only was defendant much older than the victim, he was also in a position of authority over her. The victim was vulnerable in that her age *and* being asleep made her readily susceptible to injury or physical restraint. The trial court properly scored OV 10 at 10 points.

Finally, defendant argues that OV 12 should not have been scored at five points because there were no contemporaneous criminal acts. Defendant argues that there was no evidence that the squeezing of the victim's thighs was done for a sexual purpose.

MCL 777.42(1)(d) indicates that five points should be assessed for OV 12 when "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed[.]" When scoring OV 12, the trial court is to "look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010). A person is guilty of CSC II when he or she engages in sexual contact with a person under 13 years of age. MCL 750.520c(1)(a). "Sexual contact" includes, in relevant part, the intentional touching of the victim's intimate parts for sexual arousal or a sexual purpose. MCL 750.520a(q). "Intimate parts" include the "primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e).

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individuals in the room. The present case, with the two girls sleeping and with no prior sexual contact between defendant and either girl, is fundamentally different.

The victim testified that defendant touched her on "the crotch." The victim also testified that defendant squeezed her inner thighs. On remand, the trial court upheld the scoring for OV 12 and stated that the jury determined that defendant had touched the victim's genital area for sexual gratification. Therefore, according to the trial court, it was unlikely that defendant's intent changed in a matter of seconds to make the squeezing of the victim's inner thighs innocent. The trial court's finding that the touching of the victim's inner thighs was for sexual gratification was not clearly erroneous. This second, sexual touching was a contemporaneous act. The trial court did not err in determining that five points should be assessed for OV 12.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra