STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 31, 2013
v CHRYSTAL LYNN-GUARDALUPE POPE, Defendant-Appellant	No. 306372 Wayne Circuit Court LC No. 11-002103-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RANDALL SCOTT OVERTON, Defendant-Appellant.	No. 308999 Wayne Circuit Court LC No. 11-002103-FC

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendants Chrystal Lynn-Guardalupe Pope and Randall Scott Overton appeal by right their convictions and sentences following their joint jury trial. The convictions resulted from the sexual abuse of defendant Pope's daughter. Defendant Pope was convicted of obstruction of justice, MCL 750.505, and the trial court sentenced her to a prison term of one to five years. We affirm defendant Pope's conviction and sentence.

Defendant Overton was convicted of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), one count of second-degree CSC (CSC-II), MCL 750.520c(1)(a), and three counts of gross indecency between a male and a female, MCL 750.338b. The trial court sentenced defendant Overton to concurrent prison terms of 25 to 40 years for the CSC-I conviction, 29 months to 15 years for the CSC-II conviction, and 17 months to 5 years for each gross indecency conviction. We affirm defendant Overton's convictions and sentences. We remand Overton's case for the ministerial task of confirming that the Amended Judgment of

Sentence accurately identifies the counts on which Overton was convicted and accurately reflects the sentences imposed on those counts.[1]

I. FACTS

Pope and Overton had been in a relationship from the time the victim was age four or five. When the victim was a young adolescent, Pope examined the victim's genital area for a "virginity check." Overton also examined the victim's genital area at that time. Subsequently, Overton required the victim to submit to periodic "virginity checks," during which Overton visually inspected her genitals. The victim testified that these incidents occurred while she was alone with Overton at his residence. On the basis of this testimony, Overton was convicted of three counts of gross indecency.

The victim also testified that Overton once used a mirror to visually observe the victim's genitals while instructing the victim to insert her finger inside her vagina, under the pretext of teaching her how to use a tampon. This testimony was the basis for Overton's CSC-I conviction. The victim further testified that on another occasion, Overton shaved her pubic hair and then applied ointment to the area. This testimony was the basis for Overton's CSC-II conviction.

After the victim disclosed the sexual abuse, investigator Amanda Doss of Children's Protective Services (CPS) arranged for a forensic interview of the victim at a Kids Talk agency. Doss informed Pope that neither Pope nor Overton was allowed to drive the victim to the agency for the interview. Nonetheless, Pope drove the victim to the agency. According to the victim, on the night before the interview and on the ride to the interview, Pope instructed her to reword her statements and to conceal information. Pope's disregard of Doss's instructions and her attempt to influence the victim's statements were the basis for her conviction of obstruction of justice.

II. DOCKET NO. 306372 – DEFENDANT POPE

In her sole issue on appeal, defendant Pope argues that she was denied the effective assistance of counsel on the ground that her counsel failed to call a certain witness at trial. Because defendant Pope did not raise an ineffective assistance of counsel claim in the trial court and this Court denied her motion to remand on this issue, our review is limited to errors apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant Pope must show that trial counsel's performance was objectively unreasonable in light of prevailing professional norms, and that but for trial counsel's error, the trial outcome would probably have been different. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[1] The record indicates that the jury acquitted Overton on Count 3, child sexually abusive activity, MCL 750.145c(2), and Count 4, accosting a child for immoral purposes, MCL 750.145a. However, the July 18, 2011, Amended Judgment of Sentence indicates a conviction and sentence on Count 4. We remand for the purpose of confirming that the record contains an accurate Judgment of Sentence and that an accurate copy has been submitted to the Department of Corrections.

Defendant Pope bears the burden of overcoming the presumption that trial counsel was effective. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

Trial counsel's decisions concerning what evidence to present and whether to call or question witnesses are matters of strategy, which this Court will not second guess. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Failure to call a witness does not constitute ineffective assistance of counsel unless it deprives the defendant of a substantial defense. *Id.* "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A defendant claiming ineffective assistance based on the failure to call a witness must provide factual support for her claim that the witness's testimony would have supported a substantial defense. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

Here, the record does not contain, nor has defendant Pope provided, factual support for her claim that the witness's testimony would have aided in establishing a substantial defense. Pope has not supplied an affidavit from the witness. Rather, Pope relies solely on the affidavit of a defense investigator, who averred that the witness would testify that the victim told her about only one incidence of abuse.

Assuming, arguendo, the investigator's affidavit summarizing the witness's statements serves as a valid offer of proof of the witness's proposed testimony, the affidavit fails to establish that defense counsel's failure to call the witness deprived defendant Pope of a substantial defense. The witness partially corroborated the victim's testimony that the victim told her about an incident of abuse. The witness did not directly contradict the victim's testimony regarding the other acts of abuse. Further, the witness's proposed testimony is primarily directed at the charges against defendant Overton. The testimony is largely irrelevant to the obstruction of justice charge against defendant Pope. That charge was not based on the alleged incidents of abuse, but rather on Pope's attempt to influence the victim with regard to the Kids Talk interview. Pope has not demonstrated that the witness's testimony could have provided a substantial defense to the obstruction of justice charge against Pope. Accordingly, defendant Pope has not shown that she was denied the effective assistance of counsel.

III. DOCKET NO. 308999 – DEFENDANT OVERTON

A. SUFFICIENCY OF THE EVIDENCE

Defendant Overton challenges the sufficiency of the evidence supporting his convictions of CSC-I, CSC-II, and gross indecency. This Court reviews challenges to the sufficiency of the evidence by viewing the evidence de novo in the "light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt." *People v Levigne*, 297 Mich App 278, 282; 823 NW2d 429 (2012). Circumstantial evidence and reasonable inferences drawn from the evidence are satisfactory to prove the elements of a crime. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012).

1. FIRST-DEGREE CRIMINAL SEXUAL CONDUCT

Overton was convicted of violating MCL 750.520b(1)(a), which provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age." "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). Overton argues on appeal that he could not be convicted of CSC-I where the evidence showed that the victim used her own finger to digitally penetrate her vagina. Overton argues that such conduct does not meet the element of "sexual penetration." We disagree.

In this case, the evidentiary basis for Overton's CSC-I conviction was the victim's testimony that she inserted her finger inside of her vagina because Overton instructed her to do so under the pretext of teaching her how to use a tampon. A rational trier of fact could find on the basis of this evidence that the prosecution proved beyond a reasonable doubt that Overton engaged in sexual penetration with the victim. The fact that the victim's vagina was penetrated by her own finger, instead of one of Overton's body parts, does not mean that the act did not constitute sexual penetration under MCL 750.520a(r). Sexual penetration under MCL 750.520a(r) includes an "intrusion . . . of any part of a person's body . . . into the genital . . . opening[] of another person's body . . . ." The use of the words "any part of a person's body" is another way of saying "any human body part." Thus, sexual penetration under MCL 750.520a(r) includes an intrusion of any human body part into the genital opening of another person. Here, Overton was engaged in the intrusion of a human body part—a finger—into the genital opening of another person's body—the victim's vagina—when the victim obeyed Overton's instruction to digitally penetrate herself under the pretext of teaching her how to use a tampon.[2]

In sum, the victim's testimony provided sufficient evidence that defendant Overton committed CSC-I as charged. Accordingly, we reject Overton's challenge to the sufficiency of the evidence on the CSC-I conviction.

2. SECOND-DEGREE CRIMINAL SEXUAL CONDUCT

Overton was convicted of violating MCL 750.520c(1)(a), which prohibits a person from engaging in sexual contact with another person under 13 years of age. "Sexual contact" is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional

[2] Sexual penetration would still exist under MCL 750.520a(r) if either (1) Overton, himself, digitally penetrated the victim's genital or anal openings, or (2) Overton instructed the victim to digitally penetrate his own anal opening. In both scenarios, there is an intrusion of a human body part into the genital or anal openings of another person's body, i.e., (1) the intrusion of Overton's finger into the victim's genital or anal opening, and (2) the intrusion of the victim's finger into Overton's anal opening, respectively. In contrast, if Overton had simply digitally penetrated himself in the victim's presence, he would not be engaged in sexual penetration under MCL 750.520a(r) because he would not be engaged in the intrusion of a human body part into the genital or anal opening of another person; rather, he would be engaged in the intrusion of a human body part into himself.

touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose[.]" MCL 750.520a(q).

At trial, the victim testified that Overton shaved her pubic area and then rubbed ointment on the area, touching her genitals. This testimony was sufficient to allow the jury to find that Overton intentionally touched the victim's intimate parts. Overton contends, however, that the evidence was insufficient to prove that the touching was done for the purpose of sexual arousal or gratification, or for a sexual purpose, because the purpose of the touching was to remove unwanted hair from the victim's body so that it would not show through her bathing suit and to then heal shaver burns that resulted from the shaving.

The term "sexual contact" incorporates the requirement that the defendant's conduct "*reasonably* be construed as being for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q) (emphasis added). "The statute's language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury's determination of the purpose of the contact." *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). "Consequently, . . . a jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose." *Id.* Here, the victim testified that she only intended to shave her "bikini area," that she was satisfied with her own shaving, and that she did not want Overton's help. According to the victim, Overton looked at the area, told her that she had missed spots, and made her lie down on the bed and open her legs. The victim stated that Overton "was just supposed to do . . . the part where . . . he could see," but he instead "did the whole bottom part." The victim also stated that she could have rubbed the ointment on the shaved area herself and she did not want Overton to do it. Given the victim's testimony that she was satisfied with her own shaving, that Overton's help was not wanted and exceeded what was necessary to accomplish the victim's intended purpose, and that there was no reason why the victim could not have applied the ointment herself, which is what she preferred, the jury could reasonably infer that Overton's conduct was neither wanted nor necessary and, viewed objectively, could reasonably be construed as having a purpose of sexual arousal or gratification. Accordingly, the evidence was sufficient to support Overton's conviction of second-degree criminal sexual conduct.

3. GROSS INDECENCY

Overton was convicted of three counts of gross indecency under MCL 750.338b, for his conduct in requiring the victim to open her legs and spread open her vagina with her hands to enable him to view her genital area from a distance of less than two feet. Overton characterizes his conduct as mere "voyerism," which he contends is insufficient to constitute gross indecency.

MCL 750.338b provides:

> Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in

> this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section. Any person convicted of a felony as provided in this section shall be punished by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

MCL 750.338b is one of three gross indecency statutes, along with MCL 750.338, which prohibits gross indecency between males, and MCL 750.338a, which prohibits gross indecency between females. The statutes do not define what constitutes "gross indecency," but case law has expounded on the meaning of that term. Early cases held that the gross indecency statutes penalized "conduct that is of such character that the common sense of society regards it as indecent and improper." *People v Szymanski*, 321 Mich 248, 252; 32 NW2d 451 (1948) (holding that the prosecutor established the corpus delicti of gross indecency by evidence that the defendant placed his hand under a girl's dress and on her leg while he sat near her in a movie theater). The "common sense" of society standard is sometimes referred to as the *Hicks-Carey-Dexter* standard, because it derives from *People v Carey*, 217 Mich 601; 187 NW 261 (1922), *People v Hicks*, 98 Mich 8; 56 NW 1102 (1893), and *People v Dexter*, 6 Mich App 247; 148 NW2d 915 (1967).

Later, in *People v Howell*, 396 Mich 16; 238 NW2d 148 (1976), Justice Levin expressed concern that the "common sense" standard was unworkable. In section II of his opinion, Justice Levin stated:

> While it no doubt would be the "common sense of society" to regard as "indecent and improper" the commission of an act of fellatio with a person under the age of consent or the forcible commission of such an act, there is no consensus regarding fellatio or other sexual acts between consenting adults in private. Some persons regard any ultimate sexual act other than intercourse between married persons for procreation as indecent and improper. However, a substantial segment of society believes it is neither indecent nor improper for consenting adults to engage in whatever sexual behavior they desire. Some would take that view only where the conduct is between persons of the opposite sex, while others would agree only if the persons were married.
>
> There being no "common sense of society' regarding sexual behavior between consenting adults in private, that test leaves the trier of fact "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v Pennsylvania*, 382 US 399, 402-403; 86 S Ct 518, 521; 15 L Ed 2d 447 (1966). Accordingly, we reject the construction of the Court of Appeals in *Dexter* and construe the term "act of gross indecency' to prohibit oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public. [*Howell*, 396 Mich at 23-24.]

Because only two other justices concurred with section II of Justice Levin's opinion, section II did not become binding precedent. *People v Jones*, 222 Mich App 595, 600; 563 NW2d 719 (1997).

Subsequent panels of this Court were divided on whether to retain the *Hicks-Carey-Dexter* definition of gross indecency, or whether to follow section II of Justice Levin's opinion in *Howell*. In *People v Brashier*, 197 Mich App 672; 496 NW2d 385 (1992), aff'd in part, rev'd in part sub nom *People v Lino*, 447 Mich 567 (1994), a special panel of this Court was convened to address the conflict. The special panel held that the *Carey* definition of gross indecency remained binding, because section II of Justice Levin's opinion in *Howell* had not been endorsed by a majority of the Supreme Court. *Brashier*, 197 Mich App at 678-679. However, our Supreme Court later considered this issue in *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994), in which it issued a memorandum opinion summarizing the points on which at least four justices had agreed. The memorandum opinion states:

> A majority of the justices are of the opinion that
>
> (1) MCL § 750.338; MSA § 28.570 is not unconstitutionally vague as it is applied to the conduct in *Lino* (Cavanagh, C.J., and Levin, Brickley, Boyle, Riley, Griffin, and Mallett, JJ.), and that the statute is not unconstitutionally vague as applied to the alleged conduct in *Brashier*. (Cavanagh, C.J., and Levin, Riley, Griffin, and Mallett, JJ.)
>
> (2) To the extent the Court of Appeals in *Brashier* interpreted *People v Carey* to leave to the jury's assessment of the common sense of the community the definition of gross indecency, the Court of Appeals is reversed. (Cavanagh, C.J., and Levin, Brickley, Boyle, and Mallett, JJ.)
>
> (3) Oral sexual conduct committed in a public place is grossly indecent under MCL § 750.338; MSA § 28.570. (Cavanagh, C.J., and Levin, Brickley, Boyle, Riley, Griffin, and Mallett, JJ.)
>
> (4) Procuring or attempting to procure the specific sexual conduct alleged in *Brashier* with a person under the age of consent can support a conviction under MCL § 750.338; MSA § 28.570, regardless of whether the conduct is performed in public. (Cavanagh, C.J., and Levin, Riley, Griffin, and Mallett, JJ.)
>
> In *Lino*, we reverse the decision of the Court of Appeals and we affirm the defendant's conviction. Fellatio performed in a public place clearly falls within the ambit of MCL § 750.338; MSA § 28.570.
>
> In *Brashier*, we reverse the decision of the Court of Appeals in part and affirm in part. Defendant Brashier's case is remanded to the trial court so that he may stand trial. Procuring or attempting to procure the specific sexual conduct alleged in *Brashier* with a person under the age of consent can support a conviction under MCL § 750.338; MSA § 28.570, regardless of whether the conduct is performed in public. [*Lino*, 447 Mich at 570-572.]

In a separate opinion, Justice Levin advocated a clear holding that "oral, anal, or manual sexual acts committed in private by consenting adults are not grossly indecent." *Id.* at 588.

This Court thereafter revisited this issue in *Jones*, 222 Mich App 595, which involved a married couple who engaged in sexual intercourse in a public prison visiting room while their children stood in a row to shield them from the view of others. The defendants argued that ordinary heterosexual conduct between a husband and a wife did not constitute gross indecency as a matter of law. *Id.* at 597. This Court stated that the *Lino* decision "has once again cast a shade of gray over the area of gross indecency." *Id.* at 601. After discussing the division of opinions in *Lino*, this Court in *Jones* stated:

> However, we have been given some guidance regarding what our role should be in such cases. As stated by the Supreme Court in *People v Warren*, 449 Mich 341, 345; 535 NW2d 173 (1995), "[o]ne of the lessons of the *Lino* inquiry is that it is prudent to decide only the case before us, and not attempt to catalog what is permitted and prohibited. . . ." Therefore, we decline to craft judicially an all-encompassing definition of what is, or what is not, grossly indecent. Until the Legislature gives the courts of this state a workable definition of gross indecency, malleable enough to protect, without unlawfully infringing on, the rights of the public, we must decide case by case, as the Supreme Court did in *Lino*, whether an act is grossly indecent. It is with this in mind that we turn to the case at bar. [*Jones*, 222 Mich App at 602.]

The Court stated that the surrounding circumstances are relevant to determining whether an act is grossly indecent. *Id*. at 603. For example, although the Court in *Lino* held that oral sex in public was grossly indecent, that did not mean that all acts of oral sex are grossly indecent. Rather, the attending circumstances made them indecent. *Id.* at 603. The Court explained:

> We obviously agree that, in and of itself, normal sexual intercourse between a husband and wife is not grossly indecent, but, as previously indicated, the act alleged to be grossly indecent cannot be looked at in a vacuum or separated from the factual situation in which it took place. In the case at bar, the prosecution alleges that defendants had sexual intercourse in a public visiting room, filled with, presumably, nonconsenting adults and children under the age of consent, with defendants' three minor children standing nearby in an attempt to shield defendants' conduct from others in the visiting room. If the facts as alleged by the prosecution are true, then defendants' conduct would constitute an act of gross indecency under MCL 750.338b. [*Id.* at 604.]

This Court again addressed this issue in *People v Drake*, 246 Mich App 637; 633 NW2d 469 (2001), in which the defendant allegedly induced minor girls to abuse him by spitting on him, spitting on his food, and giving him feces and urine, which he ate. Neither the defendant nor any of the girls performed this conduct unclothed, and the defendant did not sexually gratify himself or overtly touch any of the girls in a sexual manner. *Id.* at 638-639. This Court held that the district court abused its discretion in failing to bind the defendant over for trial on three counts of gross indecency arising from this conduct. *Id.* at 643. This Court held that although

the defendant's conduct did not involve overt sexual conduct, it could nonetheless be construed as sexual activity. This Court explained:

> Experience has shown that people can derive sexual gratification from a variety of acts, without ever engaging in any of the mentioned activities. For example, an individual might be sexually aroused or gratified by sexual masochistic behaviors, such as being humiliated and beaten. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) (Washington, DC, 1994), p 529.
>
> In order to constitute grossly indecent behavior, the acts must be overt in the sense that they are open and perceivable. The motivation for the behavior can be inferred from the totality of the circumstances and should be considered case by case. *Jones*, *supra* at 602. Clearly it is easier to establish the sexual motivation for the behavior if the act in issue involves sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person's genitals or anus. Nonetheless, the sexual nature of the activity can be inferred even in the absence of such behavior. [*Drake*, 246 Mich App at 642-643.]

In *People v Bono (On Remand)*, 249 Mich App 115, 119-120; 641 NW2d 278 (2002), the defendants, both adult males, engaged in hand-genital sex with each other while they occupied adjacent stalls in a public restroom. A security officer was able to observe the activity from below the stall doors. *Id.* This Court cited *Jones*, 222 Mich App at 602, for the statement that *Lino* "leaves us with a definitive statement regarding how not to determine whether an act is grossly indecent, but without a definitive statement regarding which acts are grossly indecent." *Bono*, 249 Mich at 121. The Court stated that "*Lino* is in harmony with Justice Levin's conclusion in *Howell* that (1) oral and manual sexual acts committed without consent or with a person under the age of consent and (2) an 'ultimate sex act committed in public' are included within the definition of 'gross indecency.'" *Bono*, 249 Mich App at 122. The Court remarked that masturbation was an "ultimate sex act," and that the facts alleged in *Bono* constituted an act of gross indecency. *Id.* at 122. *Bono* did not comment on *Drake*.

In this appeal, Overton suggests that *Drake* was wrongly decided, because this Court in *Bono* adopted Justice Levin's *Howell* standard. Overton argues that under the *Howell* standard, proof of gross indecency requires evidence of an oral or manual sex act committed without consent or with someone under the age of consent. Overton misconstrues *Howell*, *Lino*, and other case law. As this Court observed in *Jones*, 222 Mich App at 602, the circumstances of the alleged conduct must be evaluated on a case-by-case basis. This Court specifically warned against attempting to catalog all permitted and prohibited acts. *Id.* Applying these standards, this Court concluded that normal sexual intercourse between a husband and wife could constitute gross indecency when done in a public area, before their children's eyes, as the children attempted to shield the couple from the view of others. Similarly, the critical fact in *Bono* was not that one defendant performed manual sex on the other, but that the act was committed in a public area. Overton's argument that *Bono* establishes bright-line parameters for gross indecency is apparently based on the following statement:

> *Lino* is in harmony with Justice Levin's conclusion in *Howell* that (1) oral and manual sexual acts committed without consent or with a person under the age of consent and (2) an "ultimate sex act committed in public" are included within the definition of "gross indecency." [*Bono*, 249 Mich App at 122.]

Although this statement recognizes that nonconsensual sexual acts and public sexual acts are *included* within the definition of gross indecency, it does not *exclude* all other acts. The holding in *Bono* is not incompatible with the holding of *Drake*. Although the conduct in *Drake* did not involve overt sexual contact or sexual gratification, this Court appropriately considered the totality of the circumstances and concluded that the defendant's behavior may be recognized as a form of deviant sexual gratification. *Drake*, 246 Mich App at 642-643.

In the instant case, the evidence permitted the jury to find that Overton caused a preteen girl to open her legs and spread open her vagina with her hands so that Overton could view her genitals from a distance of less than two feet for his own sexual gratification. Although this conduct may not have involved an *overt* sexual act, the evidence permitted the jury to find that it was sexual in nature, and that it was committed against a minor child without her consent. The victim testified that she did not want to expose her private parts to Overton. We reject Overton's attempt to characterize his conduct as involving nothing more than mere "voyeurism." The circumstances did not involve Overton merely seizing an opportunity to view the victim while unclothed, but rather involved him requiring the victim to submit to an inspection, against her will, during which she was required to expose and manually manipulate her genital area. Considering the surrounding circumstances, Overton's conduct qualifies as gross indecency. Neither the private setting of Overton's conduct nor the absence of physical contact precluded designating his conduct as gross indecency. Accordingly, the evidence was sufficient to support Overton's convictions for gross indecency.

B. JURY INSTRUCTIONS

Overton raises two claims of instructional error. "A court must consider the instructions as a whole, rather than piecemeal, to determine whether any error occurred." *Kowalski*, 489 Mich at 501. "[A]n imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Id.* at 501-502.

1. FAILURE TO GIVE A SPECIFIC UNANIMITY INSTRUCTION

The trial court instructed the jury that "[a] verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict." Overton argues that because the evidence referred to two distinct acts (shaving the victim's pubic area and applying an ointment to the victim's pubic area), each of which could have individually established a basis for a second-degree criminal sexual conduct conviction, the trial court erred by failing to instruct the jury that it was required to unanimously agree on the act that formed the basis for any conviction. Overton argues that the absence of such an instruction violated his right to a unanimous verdict because it is possible that some jurors voted to convict him on the basis of the shaving incident, while others voted to convict him on the basis of the ointment

application. Because Overton's counsel expressed satisfaction with the instructions (other than the gross indecency instruction) this issue is waived. *Kowalski*, 489 Mich at 503.

Even if the issue were preserved, Overton would not prevail in his challenge to the unanimity instruction. In *People v Martin*, 271 Mich App 281, 338; 721 NW2d 815 (2006), this Court explained:

> A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). It is undisputed that the trial court gave the jury a general unanimity instruction at defendants' trial. Under most circumstances, a general instruction on the unanimity requirement will be adequate. *Cooks*, *supra* at 524. However, the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Id.*

In *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), the defendant was charged with and convicted of one count of CSC-I. The complainant, a ten-year-old child, testified that the defendant committed three acts of anal penetration, each occurring on a different day in the same week. In each instance, the defendant approached the complainant while she performed household chores, fondled her breasts and vagina, pushed her against a wall, and penetrated her anus with his penis. *Id.* at 506-507. The defendant argued that the trial court's failure to give a specific unanimity instruction constituted error requiring reversal. Our Supreme Court disagreed, stating:

> After considering the arguments presented in this appeal and carefully reviewing the relevant federal and state authority available, we reach the conclusion that a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*Id.* at 512-513.]

The Court also summarized United States Supreme Court and other federal cases discussing the unanimity requirement and stated:

> [I]t appears that federal trial courts must give a specific unanimity instruction to the jury if 1) the alternative acts presented as evidence are conceptually distinct or there are distinct proofs regarding each alternative, or 2) other factors are present that create a genuine possibility of juror confusion or disagreement. Where the government offers a series of similar acts as proof of

> the actus reus and there is no indication of juror confusion or disagreement, the general unanimity instruction is deemed sufficient.
>
> * * *
>
> We are persuaded by the foregoing federal and state authority that if alternative acts allegedly committed by a defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is a reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 519, 524.]

Here, no party materially distinguished Overton's conduct in regard to the shaving and ointment application incidents. The victim's testimony indicated that these acts were temporally linked and related in purpose. According to the victim, the ointment application occurred immediately after Overton shaved her pubic area, because the shaving caused razor bumps to the shaved area. Although Overton admitted shaving the victim's inner thighs, he denied shaving her pubic area or applying ointment. Further, Overton denied that his conduct in relation to this incident was intended for a sexual purpose. Rather, he claimed that he only intended to assist the victim in removing unwanted hair from her "bikini" line. Because the testimony indicated that the ointment application occurred as a consequence of the pubic shaving, and Overton denied committing both acts, there was no reason for the jury to view these acts as materially distinct. There is no reason to believe that a juror would find that Overton applied ointment without also finding that he shaved the victim's pubic area. Further, because the testimony indicated that the ointment application was intended to treat the razor bumps, there was no reason for the jury to find that Overton's intent with respect to either act would have been any different. Because these circumstances did not create a danger that the jury would divide as to which act Overton committed, the trial court's general unanimity instruction was sufficient, and a more specific unanimity instruction was not required. *Cooks*, 446 Mich App at 512-513.

2. GROSS INDECENCY INSTRUCTION

Overton argues that the trial court erroneously instructed the jury on gross indecency. Overton objected to the instruction at trial, thereby preserving the issue for appeal. *Kowalski*, 489 Mich at 502-503. The trial court instructed the jury as follows with respect to the gross indecency charges:

> To prove this charge, the prosecutor must prove each of the elements beyond a reasonable doubt. First, the Defendant caused [the victim] to engage in a sexual act that involved spreading apart in her genital area, with her hand, so Defendant, Overton, could look at her genital area.
>
> Second, that when Defendant, Overton, did this, he did it with the intent that he derived sexual gratification from the act. To prove this charge, the

> prosecution does not have to prove their [sic] was sexual contact between [the victim] and Defendant, Overton.

Overton argues that the trial court was required to instruct the jury not only that he performed the act in question, but also that the act in question was a sexual act. Overton also argues that the court was required to instruct the jury on how to determine whether the act was a sexual act. Viewed as a whole, the trial court's jury instruction adequately addressed both of these concepts. The court instructed the jury that it was required to find that Overton caused the victim to engage in a "sexual act." The court further instructed the jury that it was required to find that Overton performed the act with the intent to derive sexual gratification. These instructions adequately conveyed both that the prohibited act had to be sexual in nature and that Overton performed the act with the intent to derive sexual gratification. Contrary to what Overton argues, the trial court's instruction properly required the jury to determine whether a sexual act was committed. Moreover, Overton did not dispute that the charged conduct occurred, but instead denied that it involved a sexual purpose. The trial court's instructions clearly informed the jury that it could not convict Overton of the charged conduct unless it determined that he acted with the intent to derive sexual gratification. The court's instructions fairly presented the issues to be tried and adequately protected Overton's rights.

We also reject Overton's related argument that the gross indecency statute is unconstitutionally vague and left him without notice that his behavior was prohibited by the statute. In *People v Gratsch*, 299 Mich App 604, 609-610; 831 NW2d 462 (2013), this Court recently explained:

> The void-for-vagueness doctrine flows from the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17, which guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. *People v Roberts*, 292 Mich App 492, 497, 808 NW2d 290 (2011). A statute may be challenged as unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. [*People v*] *Noble*, 238 Mich App [647, 651; 608 NW2d 123 [(1999)]. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id.* at 652; *Roberts*, 292 Mich App at 497. "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Noble*, 238 Mich App at 652. But "[a] term that requires persons of ordinary intelligence to speculate about its meaning and differ on its application may not be used." *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007).

Overton argues that the gross indecency statute "does not provide fair notice of the conduct proscribed," and that his convictions of gross indecency are sustainable only if this Court's decision in *Drake*, 246 Mich App 637, is found to be valid. Overton contends that *Drake* was either wrongly decided or, if it was not, its holding must be limited to its facts. As previously discussed in section III. A. 3., the defendant's conduct in *Drake*, and Overton's

conduct in this case, was conduct that reasonably may be regarded as sexual in nature. In this case, the prosecution presented evidence to support a finding that Overton caused a preteen girl to open her legs and spread open her vagina with her hands so that Overton could view her genitals from a distance of less than two feet. The case law addressing the gross indecency statutes, see section III. A. 3., *supra*, enabled Overton to fairly ascertain the scope and meaning of the statute and provided fair notice that this conduct was prohibited.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Overton next argues that he is entitled to a new trial because he did not receive the effective assistance of counsel at trial. Although Overton filed a motion for a new trial based on ineffective assistance of counsel and requested an evidentiary hearing, the trial court denied the motion without conducting an evidentiary hearing. Accordingly, we review Overton's claims for errors apparent from the record. *Jordan*, 275 Mich App at 667.

Overton first argues that his trial counsel was ineffective for failing to move for a directed verdict and failing to object to erroneous jury instructions. The record discloses that Overton's counsel did in fact move for a directed verdict and also objected to the jury instruction on the gross indecency charges. Therefore, counsel was not ineffective in these respects. Although counsel did not request a specific unanimity instruction in relation to the CSC-II charge, as explained previously, the general unanimity instruction was sufficient. Therefore, counsel was not ineffective for failing to request a specific instruction.

Overton next argues that counsel was ineffective for failing to interview and call two specific witnesses to determine whether their testimony could be used to impeach the victim's testimony. As explained previously, failure to call a witness does not constitute ineffective assistance of counsel unless it deprives the defendant of a substantial defense. *Dixon*, 263 Mich App at 398. A defendant claiming ineffective assistance based on the failure to call a witness must provide factual support for his claim that the witness's testimony would have supported a substantial defense. *Pratt*, 254 Mich App at 430. Overton has not supplied offers of proof to overcome the presumption of sound strategy and has not shown that the failure to call either witness deprived him of a substantial defense.

Overton next argues that counsel was ineffective for failing to move for severance of his trial from Pope's trial. "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.125(C). In *People v Hana*, 447 Mich 325, 346-347; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994), our Supreme Court stated:

> [P]ursuant to MCL § 768.5; MSA § 28.1028, and MCR 6.121(D), the decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant

> indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

"Inconsistency of defenses is not enough to mandate severance; rather the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349. "[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice" in and of itself as a basis for severing trials. *Id.* (citation and internal quotations omitted). The use of separate juries is a partial form of severance. *Id.* at 351.

During a pretrial conference, Overton's counsel stated that he and Overton had discussed the joint trial. Counsel stated: "It is his feeling that [Overton] is best served by one jury. . . . Therefore, he is not asking for a separate jury." This exchange indicates that the decision to proceed with a joint trial, before a single jury, was a matter of trial strategy. Trial counsel's strategic decisions will not be second-guessed on appeal. *Petri*, 279 Mich App at 411.

Overton nevertheless argues that he was prejudiced by investigator Doss's testimony regarding the Kids Talk interview and by information that the victim was placed in a shelter and another child in a foster home because Doss did not believe they were safe in Overton's home. He also argues that Doss's testimony regarding Pope's statements were inadmissible and prejudicial as applied to him. However, Pope's defense of the obstruction of justice charge and her testimony about the underlying allegations against Overton were mostly harmonious with Overton's defense that the victim's allegations were either fabrications or distortions of innocent conduct. Counsel could have reasonably determined that the trial court's jury instructions advising the jury that it was their role to determine the witnesses' credibility, that it was required to consider each defendant separately, and that any evidence limited to one defendant should not be considered against the other defendant would be sufficient to protect Overton's rights, and that the perceived advantages of a joint trial outweighed any potential risks. Overton has not overcome the presumption that defense counsel's decision to proceed with a joint trial was objectively reasonable.

Overton next argues that defense counsel was ineffective for failing to object to the prosecutor's conduct of eliciting Doss's testimony "as to the ultimate issue of guilt" in this case. We disagree. A review of the challenged testimony reveals that Doss did not provide an opinion on Overton's guilt or innocence, or any ultimate issue in the case. Doss merely expressed that she did not share the same opinion as Pope regarding whether Overton was being a parent to the victim. Doss did not further offer any opinion regarding Overton's conduct, let alone his guilt or innocence. It was not unreasonable for counsel to determine that an objection to Doss's brief testimony was not necessary.

Overton also argues that counsel was ineffective for failing to object when the prosecutor cross-examined him regarding his knowledge of whether his charged conduct was unlawful. We disagree with Overton's argument that the prosecutor's line of questioning required him to provide a de facto expert opinion on his own guilt. The prosecutor did not ask Overton to give an expert opinion as to whether his actions were illegal. The line of questioning concerned Overton's own personal knowledge, which was relevant to his intent and state of mind. Counsel was not ineffective for failing to make a futile objection to this proper cross-examination. *People v Fike,* 228 Mich App 178, 182; 577 NW2d 903 (1998).

For these reasons, we conclude that Overton was not denied the effective assistance of counsel at trial.

D. EXCLUSION OF OVERTON'S RECORDED POLICE INTERVIEW

Overton argues that the trial court erred when it denied his request to play his entire recorded police interview after the prosecutor asked him about a statement he made during the interview. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Evidentiary decisions involving preliminary questions of law, such as the application of a statute or rule of evidence, are reviewed de novo. *Id.*

At trial, the prosecutor asked Overton, a police officer, if he made a statement during his police interview "about what the guys would feel, if they knew what the allegations were?" Overton admitted making a statement indicating that they would "kill" him if they knew about the allegations. Overton explained in his testimony that he meant that other officers would harass and "kill [him] with jokes," such as placing "a box of tampons on my desk or something of that nature." Overton now argues that the trial court erred by refusing to admit his entire recorded police interview to allow the jury to consider the full context of his conversation with the police detective, during which he made the statement in question. Overton argues that the trial court was required to admit the entire recorded interview under MRE 106, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

MRE 106 "does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions a portion of it." *People v Herndon*, 246 Mich App 371, 412 n 85; 633 NW2d 376 (2001). Rather, MRE 106 logically limits the supplemental evidence to evidence that "ought in fairness to be considered contemporaneously with it." *Id.* MRE 106 is "designed to prevent unfairness which may result if a statement is taken out of context." See *Moody v Pulte Homes, Inc*, 125 Mich App 739, 747; 337 NW2d 283 (1983), rev'd on other grounds 423 Mich 150 (1985).

We agree with plaintiff that because the trial prosecutor did not introduce any portion of a written or recorded statement, but rather only questioned Overton about whether he made an oral statement to a police detective, MRE 106 does not apply. Even if it did apply, however, we do not believe that the trial court abused its discretion in determining that admission of the entire recorded interview was not necessary. The prosecutor merely asked Overton if he had made a statement. Overton acknowledged that he did, and he was given the opportunity to explain what he meant by the statement. The explanation was not part of the recorded interview. Under these circumstances, fairness did not require that the entire recorded interview be played for the jury. The trial court did not abuse its discretion by excluding the evidence.

E. OVERTON'S 25-YEAR MINIMUM SENTENCE FOR FIRST-DEGREE CSC

Overton argues that the statutory mandatory minimum sentence of 25 years for CSC-I is unconstitutionally cruel or unusual. This Court has considered this issue and has concluded that the mandatory sentence in MCL 750.520b(2)(c) does not constitute cruel and/or unusual punishment. *People v Benton*, 294 Mich App 191, 207; 817 NW2d 599 (2011). We are bound to follow *Benton*. MCR 7.215(J)(1). Accordingly, we reject defendant's argument that his sentence on the CSC-I count is unconstitutional.

In Docket No. 306372, we affirm defendant Pope's conviction and sentence. In Docket No. 308999, we affirm defendant Overton's convictions and sentences. We remand Docket No. 308999 for the ministerial task of confirming that the controlling Judgment of Sentence is accurate, and that an accurate copy has been submitted to the Department of Corrections. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell