STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2013
v	No. 308229 Monroe Circuit Court
DWAIN ALLEN CARROLL, Defendant-Appellant.	LC No. 11-038798-FC

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of aggravated indecent exposure, MCL 750.335a(2)(b), one count of accosting a child for immoral purposes, MCL 750.145a, two counts of first-degree criminal sexual conduct (CSC) (person under 13, defendant 17 or older), MCL 750.520b(2)(b), and two counts of second-degree CSC (person under 13, defendant 17 or older), MCL 750.520c(2)(b). Defendant was sentenced, as second habitual offender, MCL 769.10, to one to three years for aggravated indecent exposure, two to six years for accosting a child for immoral purposes, 8 to 22-1/2 years for each conviction of second-degree CSC, and 25 to 40 years for each count of first-degree CSC. We affirm.

Before discussing the content of defendant's numerous claims, we note that defendant has filed three briefs on appeal: his initial appeal filed by previous appellate counsel who has since withdrawn, a supplemental brief filed by defendant's newly appointed appellate counsel, and a Standard 4 brief. Each will be addressed in turn.

DEFENDANT'S INITIAL BRIEF ON APPEAL

Defendant raises four issues on appeal in his initial brief. First, defendant claims that his due process rights were violated when Detective David Lamontaine failed to record the interviews of M.M. and J.P., who accused defendant of committing sexual offenses against them. Additionally, defendant claims that his due process rights were violated when Lamontaine destroyed his notes that he took during the interviews of both M.M. and J.P. We disagree. Because this issue, however, was not preserved for appeal, this Court must review it for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A plain error is one that is "clear or obvious," and the error must affect the defendant's "substantial rights." *Id.* at 763. Lastly, defendant must have been prejudiced by the plain error. *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or an

error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id.* at 763-764 (internal quotations and alterations omitted).

A criminal defendant has the right to obtain evidence, upon request, "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Thus, a prosecutor violates the Due Process Clause of the United States Constitution when he or she suppresses evidence material to the defendant. *Id.* This violation is commonly referred to as a "*Brady* violation," and

> [i]n order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998) (internal citations omitted).]

However, the "failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness." *Id.* Furthermore, evidence is only material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*

"In order to warrant reversal on the claimed due process violation, a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). Additionally, "[f]ailure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *Id.*, quoting *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), citing *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). In particular, the United States Supreme Court found that even where the evidence that is destroyed would have been "potentially useful," the evidence must have been destroyed in bad faith to constitute a Due Process violation. *Youngblood*, 488 US at 58. Quoting *Black's Law Dictionary*, this Court has found that bad faith "is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *Black's Law Dictionary*, (6th ed), page 139.

Lamontaine admitted that he destroyed the notes after he wrote his report the day after the interviews. No evidence on the record supports a conclusion that anything in Lamontaine's notes was favorable to defendant. Additionally, no evidence on the record supports a finding that Lamontaine destroyed his notes in bad faith or that he chose to not record the interviews in bad faith. Furthermore, had the evidence not been destroyed and turned over, there is no evidence that the outcome would have been different. Thus, defendant has not proved that the evidence was material. In fact, all of the parties who were part of the interviews, Lamontaine, M.M., and J.P. testified. While defendant goes to great lengths to argue that the interviews were

tainted and that the notes would have revealed this, the jury heard testimony from the interviewer and the interviewees. Additionally, the jury also heard testimony from all of the parties who spoke with M.M. and J.P. before they were interviewed by Lamontaine. From all of this evidence, the jury could have learned what took place during the interviews. Lastly, Lamontaine did complete a report only one day after conducting the interviews with the use of his notes. The notes were incorporated in his report, and the time the report was completed was close enough in time to assume that the report was most likely accurate. Thus, Lamontaine's destruction of his notes was not a plain error.

Next, defendant claims that the prosecution committed prosecutorial misconduct when it failed to move to introduce evidence of prior sexual offenses defendant allegedly committed against M.M. and J.P. Moreover, defendant claims that the trial court erred by allowing this evidence to be presented. We disagree.

To preserve an evidentiary issue for appeal, an issue must be raised before, addressed by, and decided by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant made no objection at the trial level regarding any testimony that defendant had improper sexual relations with M.M. and J.P. at an earlier date. Thus, this issue is not preserved for appeal. Unpreserved claims of constitutional error are reviewed for plain error. *Carines*, 460 Mich at 764. A plain error is one that is "clear or obvious," and the error must affect the defendant's "substantial rights." *Id.* at 763. Lastly, defendant must have been prejudiced by the plain error. *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id.* at 763-764 (internal quotations and alterations omitted).

Defendant was not denied the right to a fair trial when evidence that he previously had been sexually involved with M.M. and J.P. was admitted into evidence. Pursuant to MCL 768.27a(1), a criminal defendant accused of committing an offense against a child may have evidence admitted against him that shows "defendant committed another listed offense against a minor." MCL 768.27a(1); 768.27a(2)(a). According to the statute, a "listed offense" is one defined in the second section of the sex offenders registration act, codified at MCL 28.722. MCL 768.27a(2)(a). All of the charges against defendant satisfy the definition of "listed offense." MCL 28.722. This evidence may be admitted and considered "for its bearing on any matter to which it is relevant." MCL 768.27a. Furthermore, "[i]f the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered." MCL 768.27a(1). Summarizing this statute, the Supreme Court has held:

> "When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b). In many cases it allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context." [*People v Watkins*, 491 Mich

450, 472; 818 NW2d 296 (2012), quoting *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007).]

Additionally, the Supreme Court held that MCL 768.27a "does not run afoul of Const 1963, art 6, § 5, and in cases in which the statute applies, it supersedes MRE 404(b)." *Watkins*, 491 Mich at 476-477.

On appeal, the prosecution contends that it provided defendant's trial counsel with copies of police reports that contained statements by the witnesses about the prior bad acts. Because there was no objection made at trial, there is no record regarding when defendant received this notice of this evidence. Based on a review of this record, the trial court's decision to admit evidence of defendant's prior sexual offenses against M.M. and J.P. was not plain error, nor did the prosecutor commit prosecutorial misconduct by introducing the evidence because MCL 768.27a clearly allows the admission of such evidence, and MRE 404(b) is not implicated.

Third, defendant contends that his trial counsel provided ineffective assistance of counsel. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant should move in the trial court for a new trial and seek to make a separate record factually supporting his claims. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant took no steps to move for a new trial, nor did he seek to make a separate factual record supporting his claims. "Thus, review is limited to the existing record." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* "This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

Defense counsel was effective. Defendant contends that trial counsel was ineffective for two reasons. First, defense counsel failed to object to Lamontaine's failure to record the interviews, Lamontaine's destruction of notes from the interviews, and the admission of Lamontaine's report. Second, defendant contends that he was denied effective assistance of counsel when defense counsel failed to object to the admission of previous, alleged sexual interactions between defendant and M.M. and defendant and J.P.

"There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Id.* To establish a claim of ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Furthermore, "[w]hether defense counsel's performance was deficient is measured against an objective standard of reasonableness." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Thus, to prevail, a defendant must

show that "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 US at 688, and he must show that he was prejudiced by counsel's performance, which can be shown by proving that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. This Court "will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). The defendant "bears the burden of demonstrating both deficient performance and prejudice[;] the defendant [also] necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

Based on the existing record, which this Court is limited to on appeal because defendant did not request a new trial or a *Ginther* hearing at the trial level, there is no evidence to support any of defendant's arguments. First, defendant's contention that defense counsel failed to object during the prosecution's questioning of Lamontaine is incorrect. At trial, Lamontaine needed to refresh his memory by looking at the report he wrote the day after he interviewed M.M. and J.P. Defendant did not object to this. However, defendant did object to a leading question posed by the prosecution, and the judge ruled in defendant's favor. While defendant did not object to the introduction of the report, he did attempt to impeach the credibility of the report and Lamontaine during cross-examination. For example, defense counsel highlighted the fact that the report was not completed until the day after the interviews were conducted. Additionally, defense counsel questioned Lamontaine extensively regarding his interview techniques and mistakes that were made during the interviews of M.M. and J.P. Defense counsel also extensively questioned Lamontaine regarding the absence of a recording and the destruction of notes from the interview. Furthermore, "[c]ounsel is not obligated to make futile objections." *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Additionally, to prove that counsel's failure to object constituted ineffective assistance of counsel, defendant must show that the failure to object fell below a standard of reasonableness and that, but for the failure to object, the outcome of trial would have been different. *People v Whitfield*, 214 Mich App 348, 357; 543 NW2d 347 (1995). Based on the record, there is no evidence that defense counsel was ineffective. Even if defense counsel should have objected, the outcome of the trial would not have been different.

Second, the prosecution had the right to present evidence that defendant had committed a sexual offense against M.M. and J.P. prior to the charges filed against defendant based on the analysis above and pursuant to MCL 768.27a. Thus, based on the record, defense counsel was not ineffective when he failed to object to the prosecution's introduction of evidence of defendant's prior bad acts. *Milstead*, 250 Mich App at 401.

Lastly, defendant contends that his convictions were not supported by sufficient evidence. We disagree.

When reviewing a claim of sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), overruled on other grounds *People v Nyx*, 479 Mich 112 (2007). This Court "must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required." *Id.* Additionally, "[t]he evidence is sufficient to convict a defendant when a rational factfinder [sic] could determine that the prosecutor proved every

element of the crimes charged beyond a reasonable doubt." *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999).

Defendant's convictions are supported by sufficient evidence. In fact, both J.P. and M.M. testified regarding exactly what defendant did to them. While much evidence was presented establishing defendant's guilt, "[t]he testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b through 750.520g]." MCL 750.520h. Thus, despite defendant's contentions, M.M.'s and J.P.'s testimony was sufficient to convict defendant.

Defendant was convicted of one count of aggravated indecent exposure, MCL 750.335a(2)(b), which provides that: "A person shall not knowingly make any open or indecent exposure of his or her person." MCL 750.335a(1). The prosecution was required to show the "exposure" was open. *People v Neal*, 266 Mich App 654, 663; 702 NW2d 696 (2005). To be open, the victim must have reasonably been expected to observe it and have been "an exposure, although not made in a public place" may constitute open exposure "if it is comprised of 'conduct consisting of a display of . . . the human anatomy under circumstances which created a substantial risk that someone might be offended.'" *Id.*, quoting *People v Huffman*, 266 Mich App 354, 360; 702 NW2d 621 (2005). Also, exposure of genitalia to a child, when done in a home, constitutes indecent exposure. *Id.* at 664. J.P. testified on her own behalf that defendant asked her to enter the bathroom, that defendant rubbed his penis in front of him, and that he ejaculated. Thus, this conviction was supported by sufficient evidence.

Defendant was also convicted of one count of accosting a child for immoral purposes, MCL 750.145a.

> A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act. Taken as a whole, the statute permits conviction under two alternative theories, one that pertains to certain acts and requires a specific intent and another that pertains to encouragement only and is silent with respect to *mens rea*. [*People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011).]

For the second theory, the "act of encouragement is the evil in itself, and an accused, by completing the act, is presumed to intend the natural consequences of his [actions]. . . ." *Id.* at 500 (insertion in original, internal quotations omitted). The statute defines the "proscribed acts" as inducing or forcing the child to "commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency . . . ." MCL 750.145a. The child must be under the age of 16. MCL 750.145a. First, both M.M. and J.P. were younger than 16 years old when these events occurred. Additionally, both M.M. and J.P. testified, at great length, regarding all of the sexual acts defendant performed on them. These actions constituted immoral acts, sexual intercourse, and gross indecencies. Thus, this conviction was supported by sufficient evidence.

Additionally, defendant was convicted of two counts of first-degree CSC and two counts of second-degree CSC. First-degree CSC requires a showing that the victim is under the age of 13 and the perpetrator was 17 or older. *People v Szalma*, 487 Mich 708, 724-725; 790 NW2d 662 (2010). MCL 750.520b(2)(b). Furthermore, to prove first-degree CSC, the prosecution was required to show that penetration occurred. *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). "Sexual penetration" "means 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. Second-degree CSC also requires a showing that a person engaged in criminal sexual conduct with a person under 13. MCL 750.520c. To prove second-degree CSC, the prosecution must show that the defendant engaged in sexual contact with another person. MCL 750.520c(1). *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Here, at a minimum, J.P. and M.M. testified that defendant performed oral sex on both of them both through cunnilingus and through oral sex performed on both M.M.'s and J.P.'s anuses. Additionally, defendant made J.P. perform fellatio on him. M.M. said defendant pushed a sex toy in her vagina. M.M. also said that defendant placed his penis in her vagina. Thus, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that each charge against defendant was proven beyond a reasonable doubt.

DEFENDANT'S SUPPLEMENTAL BRIEF

In defendant's supplemental brief on appeal, appellate counsel raises three additional issues. Each issue will be addressed in turn.

First, defendant contends that he is entitled to a new trial because the verdict was against the great weight of the evidence. We disagree.

Because defendant did not move for a new trial, this issue is not preserved. MCR 2.611(A)(1)(e). Thus, defendant's unpreserved great weight of the evidence claim is reviewed for plain error. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

When reviewing a question of whether a verdict was against the great weight of the evidence, this Court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). A jury's verdict is against the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, 456 Mich at 627; *Unger*, 278 Mich App at 232. "Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Unger*, 278 Mich App at 232. Exceptional circumstances include situations where "a witness's testimony is . . . so inherently implausible that it could not be believed by a reasonable juror" or "where the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Lemmon*, 456 Mich at 644 (internal quotations omitted).

In his supplemental brief, defendant asserts that in his first brief on appeal prior appellate counsel brought a great weight of the evidence claim. However, in defendant's first brief on appeal, prior counsel actually brought a sufficiency of the evidence claim, which was analyzed above in this opinion.

Now, in his supplemental brief, defendant contends that "the credible trial evidence weighs against the jury's verdict." Defendant now focuses on the fact that Lamontaine failed to follow the proper protocol during the forensic interview of M.M. and J.P. Furthermore, defendant contends that J.P.'s father was supposed to be a key prosecution witness because M.M. disclosed the allegations of what defendant did to her and J.P. to J.P.'s father. It is unclear how this impacts the great weight of the evidence.

Also, defendant contends that M.M. and J.P.'s mother had motive to fabricate these allegations because defendant had ended his relationship with their mother and had stopped making payments to her parents for a housing loan they had given to defendant. Again, it is unclear how this impacts the great weight of the evidence. If anything, this raises an issue of credibility. Absent exceptional circumstances, an issue of witness credibility should be left for the trier of fact. *Lemmon*, 456 Mich at 642-643. No exceptional circumstances are presented here.

Additionally, defendant contends that the verdict was against the great weight of the evidence because none of his DNA was found on a sex toy that was found in the M.M. and J.P.'s mother's home and was allegedly used by defendant on J.P. However, it is alleged that the toy was used on J.P., and there is no reason why defendant's DNA would be on the toy. What defendant ignores, however, is the fact that M.M. and J.P. both testified to the sexual abuse they suffered at the hands of defendant. This testimony, even without introduction of the sex toy, was more than enough to convict defendant. For this and all of the reasons addressed above under the sufficiency of the evidence analysis, defendant's conviction was supported by the great weight of the evidence.

Lastly, defendant contends that this Court should consider the results of polygraph examinations to which defendant submitted himself. Defendant presents this as a great weight of the evidence argument. However, this is an argument that should be made in a motion for a new trial. To make this argument, defendant relies on this Court's 1994 decision, *People v Mechura*, 205 Mich App 481, 484-485; 517 NW2d 797 (1994). According to *Mechura,*

> [p]olygraph test results may be considered in deciding a motion for a new trial where . . . (1) they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meet with the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject. [*Id*.]

Normally, for a court to consider this evidence, a defendant must bring a motion for a new trial. *Id.* at 484. In his motion to remand, defendant requested that he be granted a new trial; however, this Court denied defendant's motion to remand. *People v Carroll*, unpublished order of the Court of Appeals, entered August 8, 2013 (Docket No. 308229). Thus, this issue is not properly before this Court.

In defendant's second issue in his supplemental brief, he contends that he was deprived of his right to a fair trial because of an act of prosecutorial misconduct the prosecution committed during closing arguments. We disagree.

To preserve a claim of prosecutorial misconduct, a defendant must object to an alleged prosecutorial impropriety. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant did not object during the prosecution's closing argument, this issue is not preserved for appeal.

"Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id.*, quoting *Carines*, 460 Mich at 752-753. A plain error is one that is "clear or obvious," and the error must affect the defendant's "substantial rights." *Carines*, 460 Mich at 763. That is, the defendant must have been prejudiced by the plain error. *Id.*

A prosecutor may not shift the burden of proof. *People v Abraham*, 256 Mich App 265, 276; 662 NW2d 836 (2003). Additionally, a prosecutor may not comment on the fact that defendant did not testify. *Id.* at 276. In particular, defendant argues that the trial court erred for two separate reasons. First, defendant contends that the prosecutor improperly shifted the burden of proof and commented on defendant's silence. To make this argument, defendant points to the following portion of the prosecution's closing argument:

> That is what the case is about. The case is certainly - - also you can't deny the fact that in this case while we have two children who got up there and testified, we've got a bunch of adults who are challenging perhaps at the best who have their own issues. Who - - none of whom - - you hear nothing about negative blood between [M.M.'s and J.P.'s father] and Dwain Carroll, and [J.P.'s father] isn't here, you know that.

Defendant contends:

> [T]he above-quoted argument clearly drew attention to [defendant's] failure to present evidence of his innocence. This more than implied that [defendant] had some duty to present evidence, and more than implied that the evidence [defendant] failed to present should be construed in the State's favor. Such argument turned the constitutional burden of proof on its head.

It is unclear to this Court how this portion of the prosecution's closing argument has anything to do with defendant's silence or how it shifts the burden of proof. At most, the statement references J.P.'s father's silence because he was not at trial. Thus, the prosecution did not err in its closing arguments by making this statement. Additionally, because the trial court instructed the jury that defendant had the right to not testify and that exercising this right could not affect the jury's verdict, even if the prosecution had commented on it, defendant was not prejudiced. Also, the same is true for the burden of proof; in fact, the court instructed the jury that defendant was "not required to prove his innocence or to do anything." See *id.*

Secondly, defendant contends that the prosecution misstated the evidence. For this argument, defendant points to the same portion of the prosecutor's closing arguments as referenced above. In particular, defendant contends that the prosecution misled the jury because

the evidence showed that M.M. and J.P.'s mother testified that defendant and J.P.'s father had issues with one another. When asked if J.P.'s father and defendant had issues, M.M. and J.P.'s mother responded:

A. They did, yes.

Q. And they still do, don't they?

A. Well definitely now.

Q. And they've – they've had issues all during the relationship, haven't they?

A. Not completely.

Q. Okay. But it's fair to say that they haven't gotten along during your relationship with Dwain, isn't that true?

A. Not the whole time.

Q. Okay. So you're saying that sometimes they did get along?

A. In the beginning.

Q. Okay. In the beginning, which would have been seven years ago?

A. We weren't together that long. I would say the first two years they did not have confrontation towards each other.

Q. Okay, but you lived together from 2004 to 2010 with a little break in-between, right?

A. No. My son was born in 2004, so - - and he was - - it was 2005 that we lived together.

Q. Okay. So roughly until 2010 then?

A. Yes, that is correct.

"When considering a claim of prosecutorial misconduct, the prosecutor's statements should be considered in context, which includes defense counsel's arguments." *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012). Furthermore, "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Here, testimony specifically provided that defendant and J.P.'s father had a troubled relationship; thus, the challenged portion of the prosecutor's closing argument was not adequately supported by the evidence. However, reversal is not required because prejudice for

an unpreserved claim can be alleviated by a timely curative jury instruction. *Unger*, 278 Mich App at 234. In the jury instructions, the judge specifically told the jury: "The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Furthermore, the court instructed the jury that "you must be careful to not consider them as such." This jury instruction cured any prejudice defendant suffered as a result of the prosecution's misstatement of the evidence.

In his third issue on appeal, defendant contends that he was denied effective assistance of counsel when his trial counsel failed to object to the instances of prosecutorial misconduct discussed above. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move in the trial court for a new trial and seek to make a separate record factually supporting his claims. *Ginther*, 390 Mich at 443. Defendant took no steps to move for a new trial, nor did he seek to make a separate factual record supporting his claims. Thus, defendant's claim is not preserved.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc*, 465 Mich at 579. "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* "This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations. This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record." *Johnson*, 293 Mich App at 90.

"Counsel is not obligated to make futile objections." *Milstead*, 250 Mich App at 401. As discussed above, the prosecution never implicated defendant's silence or shifted the burden of proof. Thus, any objection would have been futile. Additionally, to prove that counsel's failure to object constituted ineffective assistance of counsel, defendant must show that the failure to object fell below a standard of reasonableness and that, but for the failure to object, the outcome of trial would have been different. *Whitfield*, 214 Mich App at 351. While it is true that defense counsel should have objected to the misstatement of the evidence regarding J.P.'s father's relationship with defendant, the error was not prejudicial because of the curative jury instruction. Thus, even if defense counsel should have objected, the outcome of the trial would not have been different.

STANDARD 4 BRIEF

Defendant also filed a Standard 4 brief. In his Standard 4 brief, defendant raises seven issues. Each will be addressed in turn.

In his first issue presented in his Standard 4 brief, defendant contends that the assistant prosecuting attorney who signed his felony information did not have the right to bring charges against defendant because the assistant prosecuting attorney is not elected. We disagree.

In general, in order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). Because defendant failed to raise this issue at trial, the issue is unpreserved. Unpreserved claims are reviewed for plain error. *Carines*, 460 Mich at 763-764.

MCL 49.42 provides:

> Any such assistant prosecuting attorney shall hold his office during the pleasure of the prosecuting attorney appointing him, *perform any and all duties pertaining to the office of prosecuting attorney at such time or times as he may be required so to do by the prosecuting attorney and during the absence or disability from any cause of the prosecuting attorney*, but he shall be subject to all the legal disqualifications and disabilities of the prosecuting attorney, and shall before entering upon the duties of his office take and subscribe the oath of office prescribed by the constitution of this state and file the same with the county clerk of his county. The compensation of any such assistant prosecuting attorney shall be paid by the prosecuting attorney appointing him. [Emphasis added.]

Defendant's argument that the felony information was unlawfully authorized by an assistant prosecuting attorney is without merit because assistant prosecuting attorneys are permitted under statute to perform "any and all" duties of the prosecutor.

In defendant's second issue in his Standard 4 brief he asks whether the district court had the jurisdiction to hear the case in the first place. In particular, defendant contends that the complaint was flawed because it provided nothing beyond the statutory language. We disagree.

In general, in order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *Giovannini*, 271 Mich App at 414. Because defendant failed to raise this issue at trial, the issue is unpreserved. Unpreserved claims are considered for plain error. *Carines*, 460 Mich at 763-764.

According to MCR 6.101, the requirements for a criminal complaint are, in pertinent part:

> (A) A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.
>
> (B) The complaint must be signed and sworn to before a judicial officer or court clerk.

"The primary function of a complaint is to move the magistrate to determine whether a warrant shall issue." *People v Higuera*, 244 Mich App 429, 443; 625 NW2d 444 (2001).

Here, the complaint contained the substance of the accusation for each count. For example, for each count of CSC First Degree, the complaint specifically provided what form of penetration was being alleged and against which child the act was committed as well as the statutory citation. The complaint is equally as specific for each additional count. Thus, the court did have jurisdiction over defendant's case because the complaint complied with MCR 6.101.

In defendant's third issue in his Standard 4 brief he contends that his convictions were based on a flawed felony information which denied him his due process rights. We disagree.

In general, in order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *Giovannini*, 271 Mich App at 414. Because defendant failed to raise this issue at trial, the issue is unpreserved. Unpreserved claims are reviewed for plain error. *Carines*, 460 Mich at 763-764.

MCL 767.45(1) provides that the indictment or information shall contain all of the following:

> (a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.
>
> (b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.
>
> (c) That the offense was committed in the county or within the jurisdiction of the court. No verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.

The test for sufficiency of an indictment or an information is: "Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case?" *Higuera*, 244 Mich App at 452-453.

The felony information notified defendant of all the charges against him. Like the complaint, the felony information outlines each individual count and provides the specific statutory provisions for each count. Additionally, like the complaint, the felony information enabled defendant to prepare his case by telling him the specific forms of penetration alleged for each CSC count and which of the two victims he allegedly penetrated. Therefore, defendant had adequate information to prepare a defense.

In defendant's fourth issue in his Standard 4 brief, he argues that every defendant has an absolute right to receive a polygraph test when charged with CSC. As defendant develops his argument, what he seems to actually argue is that he passed two polygraph examinations before trial; thus, this obviated his need for a trial. Defendant asserts that because the prosecution proceeded with the CSC case against him, even though the prosecutor knew that defendant passed polygraph examinations, the prosecutor committed prosecutorial misconduct. We disagree.

In general, in order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *Giovannini*, 271 Mich App at 414. Because defendant failed to raise this issue at trial, the issue is unpreserved. Unpreserved claims are considered for plain error. *Carines*, 460 Mich at 763-764.

MCL 776.21 provides that "[a] defendant who allegedly has committed" CSC "shall be given a polygraph examination or lie detector test if the defendant requests it." In this case,

defendant had three polygraph tests before his trial. He was found to be truthful during the first two tests, and the results of the third test were inconclusive.

"The purpose of affording individuals accused of criminal sexual conduct a right to a polygraph exam is to provide a means by which accused individuals can demonstrate their innocence, thereby obviating the necessity of a trial." *People v Phillips*, 251 Mich App 100, 107; 649 NW2d 407 (2002); aff'd 469 Mich 390 (2003). No published cases address defendant's question whether the prosecution is required to drop charges if a defendant passes a polygraph test. However, MCL 776.21(5) provides a defendant with the right to have a polygraph examination, but nothing in the rule requires that prosecutors dismiss the charges even though defendant passed the examination. Thus, the prosecution did not err by proceeding with the charges against defendant.

In defendant's fifth issue in his Standard 4 brief, defendant contends that he was denied a fair trial because his confrontation rights were violated. In particular, defendant alleges that when Lamontaine destroyed his notes from his interview with M.M. and J.P., defendant's constitutional rights were violated because "[t]heir destruction is error affecting Appellant's rights to adequately cross-examine and expose the witnesses and the detective to impeachment with their original account of the events in question." We disagree. This issue was raised by defendant's first appellate counsel and was addressed above.

In his sixth issue in his Standard 4 brief, defendant argues defendant was denied the right to a fair trial because his "conviction was predicated on perjured testimony." We disagree.

In general, in order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *Giovannini*, 271 Mich App at 414. Because defendant failed to raise this issue at trial, the issue is unpreserved. Unpreserved claims are considered for plain error. *Carines*, 460 Mich at 763-764.

Defendant presents two separate challenges under this issue. First, defendant contends that the prosecution asked Lamontaine a misleading question, and Lamontaine provided a false answer to that question. In particular, defendant points to a portion of testimony where Lamontaine described the discovery of a sex toy. At trial, the prosecution held up a sex toy and articulated that "[t]his is the actual toy." The prosecution then asked Lamontaine, "And is that what you received from [M.M. and J.P.'s mother]?" Lamontaine responded with "yes."

Defendant points out that later in the transcript, during cross-examination, Lamontaine admitted that he did not receive the evidence directly from M.M. and J.P.'s mother. Rather, Lamontaine later clarified that the sex toy was actually delivered to him by the prosecuting attorney who received the sex toy from someone in M.M. and J.P.'s mother's family.

Defendant contends that "[t]his acknowledgment was not only an admission by Detective Lamontaine, but it was a declaration that the prosecution mislead [sic] the jury as well. She was the person who actually received the evidence from [the family member], but she despite her contrary knowledge, still asked the detective if [the sex toy] . . . was the toy he received from [M.M. and J.P.'s mother]."

Defendant also contends that Lamontaine made a second false statement. This particular statement involves discussion of the same sex toy mentioned previously. Defendant takes issue with Lamontaine's testimony that M.M. identified the sex toy he claimed to have received from M.M. and J.P.'s mother. Specifically, Lamontaine testified, "Well I know that [M.M.] identified it." Defendant correctly points out that Lamontaine's testimony that M.M. identified the sex toy was factually impossible; in fact, Lamontaine specifically testified that he did not speak with M.M. or J.P. after his initial interview of the girls, which occurred on September 16, 2010, and the toy was not discovered until after the interview.

Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). "It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Furthermore, "[i]f a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (internal quotations omitted). In other words, "a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment." *Id.* "Thus, it is the misconduct's effect on the trial, not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes." *Id.* at 390. Ultimately, this Court's "entire focus . . . must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Id.*

The main question is whether the tainted evidence is material to defendant's guilt. Defendant correctly asserts that both of Lamontaine's statements were factually inaccurate. However, these statements did not affect the outcome of the trial. Defendant was charged under and found guilty of two counts of first-degree CSC, MCL 750.520b(2)(b), and two counts of second-degree CSC, MCL 750.520c(2)(b). Lamontaine's testimony involving the sex toy, who delivered it to whom, and M.M.'s identification of it, while damaging and incorrect, were not material to defendant's convictions. In fact, even without any evidence of the sex toy, an abundant amount of evidence presented at trial pointed to defendant's guilt, including J.P.'s and M.M.'s testimony at trial where they specifically discussed what defendant did to them. Furthermore, while Lamontaine's statements were incorrect, he did, upon further questioning, give the truthful answers. Thus, these misstatements seem to come down more to a question of credibility rather than perjury. See *Lemmon*, 456 Mich at 637 ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses.").

In defendant's seventh and final question presented in his Standard 4 brief, defendant contends that his previous appellate attorney, who filed the original brief in this case, was ineffective in his representation of defendant on appeal. We disagree. Defendant makes numerous arguments regarding appellate counsel's ineffectiveness, and each will be addressed in turn.

Normally, to preserve a claim of ineffective assistance of counsel, a defendant must move in the trial court for a new trial and seek to make a separate record factually supporting his claims. *Ginther*, 390 Mich at 443. Because defendant has taken no steps to make a separate

factual record supporting his claims with this Court, defendant's claim is not preserved. The same standard also applies when analyzing claims of ineffective assistance of appellate counsel. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993).

With regard to defendant's first contention, defendant was not prejudiced by previous counsel's failure to identify the correct standard of review and correct transcript pages in the record. Neither of these mistakes by previous appellate counsel impacted defendant's case because we were able to locate the correct standard of review and relevant portions of the transcript to decide the issue.

Secondly, while it is true that previous appellate counsel did incorrectly identify the law to analyze the second issue, this Court was able to correctly analyze the issue, as noted above. Furthermore, previous counsel's mistake did not, in any way, impact defendant's ability to have the issue fairly analyzed.

Thus, defendant was not prejudiced by the mistakes made by previous appellate counsel, and previous appellate counsel's performance was not ineffective.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly