STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 308353 Muskegon Circuit Court
STEVEN LI-HUA WEI, Defendant-Appellant.	LC No. 10-059330-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced to 71 months to 15 years' imprisonment for each second-degree criminal sexual conduct conviction and 25 to 45 years' imprisonment for each first-degree criminal sexual conduct conviction. We affirm.

I. FACTUAL BACKGROUND

This case arises from defendant's sexual assaults on the victim, his stepdaughter for approximately two years, around the time when the victim was ten years old. According to the victim, during that time frame defendant would typically sexually assault the victim on Monday evenings, when his wife would take her son to his weekly cub scout meetings. The sexual abuse would occur in defendant's bedroom. It would begin by defendant removing both his and the victim's clothes. Defendant would rub the victim's chest and vaginal areas with his hand. There were two positions defendant used during his sexual assault of the victim. In the first position, the victim would be laying on her back on the bed, facing defendant. Defendant would get on top of the victim and rub his penis on the top of the victim's vaginal area. In the second position, the victim would be laying on her stomach, facing the bed. Defendant would get on top of the victim and rub his penis in between the victim's buttock crevice until he ejaculated. When defendant rubbed his penis in between the buttock crevice, it would touch both the anal opening and the vaginal opening; however, the victim denied that the penis ever went inside either opening. After the sexual abuse ended, defendant told the victim that if she told people about the abuse, her mother's family would die and she would be sent to an orphanage. DNA testing also linked defendant to the victim's genital area and underwear. Defendant, who admitted to certain conduct to the police, did not testify and offered no witnesses.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct because the evidence failed to establish that sexual penetration, as defined by MCL 750.520a(r), occurred. "We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond [a] reasonable doubt." *Id*. at 196. "In reviewing the sufficiency of the evidence, this Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

"To prove CSC I under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration with another person under the age of thirteen." *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). "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.'" *Id.*, quoting MCL 750.520a(r) (emphasis added). Penetration of the genital opening includes both the vagina and the labia majora. *People v Lockett*, 295 Mich App 165, 188; 814 NW2d 295 (2012); *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). Likewise, penetration of the anal opening includes the crease of the buttocks, and the area immediately surrounding the anal opening. See MCL 750.520a(r); *People v Peterson*, 450 Mich 349, 354; 537 NW2d 857 (1995) (including facts that distinguish between the anal canal and the area surrounding the anal opening). Additionally, "[c]ircumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

In looking at the evidence in the light most favorable to the prosecution, there was sufficient evidence for the jury to find that defendant committed first-degree criminal sexual conduct by sexually penetrating the victim. The victim testified that defendant would touch her genital opening with his penis and hands. While the victim denied that defendant's penis went into her vagina, she indicated on a diagram of the female genitalia that defendant's penis touched the area immediately around the opening to her vagina, past the labia majora. The victim also testified that defendant would touch her anal opening with his penis. The victim stated that defendant's penis touched her butt cheeks and the crevice of her buttocks.

Melissa Peterson, a therapist and medical coordinator at the Children's Advocacy Center, testified that the victim told her that defendant touched the victim's chest and the top of her vaginal area with his hands, and would touch the top of the victim's vaginal opening with his penis. According to the victim, at other times defendant's penis would touch both the anal and vaginal openings because it went over both, but, his penis did not go into either opening. However, defendant's penis separated the victim's labia majora and labia minora. Similarly, Sue Johnson, a children's protective services investigator, testified that, according to the victim, defendant would "wiggle" his penis on her vaginal and anal openings. Moreover, although the

victim denied "penetration," Dr. Robert Hoogstra testified that because the victim was only ten years old, it was difficult to ascertain her opinion of what constituted penetration. And, more importantly, it is the statutory definition of penetration that controls, not the victim's understanding of that term.

Additionally, defendant's semen was found inside the victim's anal opening, and Dr. Gerald Buchanan testified that it would be unusual for semen to be inside the anus without being deposited there. Consequently, despite defendant's argument that because the victim denied being "penetrated," he cannot be convicted of first-degree criminal sexual conduct, it is clear that, under the statute, defendant sexually penetrated the victim's vaginal and anal openings because he touched both the vaginal and anal openings with his penis. *Lockett*, 295 Mich App at 188; *Peterson*, 450 Mich at 354. There was sufficient evidence in the record to support the jury's verdict.

B. PROSECUTORIAL MISCONDUCT

Defendant asserts several instances of misconduct by the prosecution during its closing argument. "In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Here, defendant failed to object to each claimed instance of misconduct. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *Id*.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64. In general, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks omitted). "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Defendant argues that he was denied a fair trial when the prosecution improperly argued that the victim was honest and had no reason to lie. "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, 448 Mich at 276. However, the prosecution can argue the evidence and all reasonable inferences arising from the evidence. *Dobek*, 274 Mich App at 66. Moreover, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). A review of the prosecution's closing argument reveals that the prosecution did not suggest he had special knowledge concerning the victim's truthfulness. Instead, the prosecution argued that the victim was a credible witness because the evidence revealed that she gave consistent testimony regarding the sexual assaults. This was a proper argument.

Next, defendant asserts that the prosecution denigrated the defense by stating that defendant's mitigation theory was "utterly ridiculous." Prosecutors "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda*, 448 Mich at 283.

> The prosecutor may not question defense counsel's veracity. When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality. [*People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984) (citations omitted).]

A review of the prosecution's closing argument clearly shows that the prosecution was commenting on defendant's defense theory, not the veracity of defense counsel. The prosecution is permitted to comment on the weakness of a defendant's theory of defense. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Consequently, there was no prosecutorial misconduct.

Finally, defendant claims that he was denied a fair trial when the prosecution appealed to the sympathy of the jury by asking the jury to consider how difficult it is for children to relate the intimate details of sexual abuse to strangers. "Appeals to the jury to sympathize with the victim constitute improper argument." *Watson*, 245 Mich App at 591. In this case, in reading the prosecution's argument in context, the prosecution was not appealing to the jury's sympathy. Instead, the prosecution was arguing that, based on the evidence, the victim was a credible witness. While the prosecution's argument may not have been the most artful way to comment on the victim's credibility, there was no prosecutorial misconduct because, as already noted, the prosecution may comment on the credibility of the victim, *Thomas*, 260 Mich App at 455, and it is given latitude in its arguments, *Bahoda*, 448 Mich at 282.

Moreover, "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Here, the trial court instructed the jury that the attorneys' arguments were not evidence. Thus, any error in the prosecution's closing argument would have been harmless.

C. STANDARD 4 BRIEF

1. AMENDMENT OF THE FELONY INFORMATION

Defendant asserts several errors regarding the trial court decision to allow the prosecution to amend the felony information to add the charge of first-degree criminal sexual conduct. "The interpretation of either a statute or a court rule is a question of law subject to review de novo." *People v McGee*, 258 Mich App 683, 686; 672 NW2d 191 (2003). "A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *Id*. at 686-687. An abuse of discretion occurs when the result of a decision falls outside the principled range of outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). Both an unpreserved constitutional error and an unpreserved jury instructional error are reviewed for

plain error affecting substantial rights. *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009); *Waclawski*, 286 Mich App at 678-679.

To begin, defendant erroneously argues the circuit court lacked jurisdiction to amend the information. It is well established that jurisdiction vests in the circuit court once a defendant is examined:

> The circuit court is a "court of general jurisdiction," MCL § 600.151[,] having "original jurisdiction in all matters not prohibited by law . . . ." Const 1963, art 6, § 13. Subject matter jurisdiction is presumed unless expressly denied by constitution or statute, *Bowie v Arder*, 441 Mich 23, 38; 490 NW2d 568 (1992). It is the right of the court to exercise jurisdiction over a class of cases, such as criminal cases. In personam jurisdiction is vested in the circuit court upon the filing of a return of the magistrate before whom the defendant waived preliminary examination, *In re Elliott*, 315 Mich 662, 675; 24 NW2d 528 (1946), or "before whom the defendant had been examined." *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 119; 215 NW2d 145 (1974). Having once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed. *In re Elliott*, *supra* at 675. [*People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998) (citation and footnote omitted).]

Consequently, the circuit court had jurisdiction to amend the felony information. Defendant also argues it was error to amend the felony information because there was no evidence to support the alternate theories of count IV (anal opening) or count V (vaginal opening).

Pursuant to the due process clause of the Fourteenth Amendment, a criminal defendant must receive "fair notice of the charges against him to permit adequate preparation of his defense." US Const, Am XIV; *Koontz v Glossa*, 731 F2d 365, 369 (CA 6, 1984). "This requires that the offense be described with some precision and certainty so as to apprise the accused of the crime with which he stands charged." *Koontz*, 731 F2d at 369. But, "[a]n information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001); MCL 767.76;[1] MCR 6.112(H);[2] see also *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). Thus, "[a]

[1] MCL 767.76 provides, in the relevant part, "[t]he court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence."

[2] MCR 6.112(H) provides, "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information."

new offense may not be added to an information by a motion to amend." *McGee*, 258 Mich App at 688.

Moreover, "[j]urisdiction having vested in the circuit court, the only legal obstacle to amending the information to reinstitute an erroneously dismissed charge is that amendment would unduly prejudice the defendant because of 'unfair surprise, inadequate notice, or insufficient opportunity to defend.'" *Goecke*, 457 Mich at 462, quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). "Where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial, and defense counsel here does not so claim." *Id*.; see also *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008) ("Once a preliminary examination is held and the defendant is bound over on any charge, the circuit court obtains jurisdiction over the defendant.").

The *Goecke* Court stated:

> For purposes of preliminary examination, the proofs adduced must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it. If the district court determines that "probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it," the defendant must be bound over for trial. MCR 6.110(E). Some evidence must be presented regarding each element of the crime or from which those elements may be inferred. *People v Doss*, 406 Mich 90, 100-101; 276 NW2d 9 (1979). It is not, however, the function of the examining magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt of the defendant's guilt; that is the province of the jury. *Id*. at 103. [*Goecke*, 457 Mich at 469-470.]

The trial court properly granted the motion to amend the felony information because defendant failed to establish prejudice. Throughout these proceedings, defendant was aware that the prosecution was seeking two first-degree criminal sexual conduct charges: one involving the vaginal opening and the other involving the anal opening. Thus, defendant cannot claim unfair surprise or inadequate notice regarding the first-degree criminal sexual conduct charges. Moreover, even if there were insufficient proofs at the preliminary examination regarding the first-degree criminal sexual conduct charges, the error was harmless because there was sufficient evidence presented at trial to sustain defendant's convictions. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001), citing *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990) ("[A]ny error in the sufficiency of the proofs at the preliminary examination is considered harmless" when the jury's verdict is supported by the evidence.). Therefore, any error regarding the bind over for count IV or V was "rendered harmless by the presentation at trial of sufficient evidence to convict." *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Next, defendant argues that MCL 750.520a(r) violates due process because it is vague. "Statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing the contrary." *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012).

> A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on First Amendment freedoms." [*People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004) (quotation marks and citations omitted).]

MCL 750.520a(r) provides:

> "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.

This statute is anything but vague, as it specifically details the conduct included within the meaning of "sexual penetration" and provides the trier of fact with structure and direction in determining whether the offense was committed.

Defendant also claims that MCR 6.112(H) violates his due process rights because it allows the amendment of an information without a preliminary examination. MCR 6.112(H) provides that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information."

"In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard." *McGee*, 258 Mich App at 699. "[T]he constitutional notice requirement is not an abstract legal technicality; it is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *Id*. at 699-700 (quotation marks and citation omitted). "So, to establish a due process violation, a defendant must prove prejudice to his defense." *Id*. at 700. Contrary to defendant's argument, this court rule comports with the requirement of due process because it permits the amendment of an information only when the amendment will not "unfairly surprise or prejudice" defendant. Consequently, there is no due process violation.[3]

Finally, defendant asserts that count IV was based on alternative theories of anal penetration, and thus, there was no jury unanimity. The Michigan Constitution provides a criminal defendant the right to a unanimous verdict. *People v Cooks*, 446 Mich 503, 510-511;

[3] Also, defendant's assertion that his due process rights were seized in violation of the fruit of the poisonous tree doctrine confuses due process rights with the Fourth Amendment protection against unlawful search and seizure. The exclusionary rule excludes *evidence* obtained through an unlawful search or seizure. See *Wong Sun v United States*, 371 US 471, 484-486; 83 S Ct 407; 9 L Ed 2d 441 (1963). Thus, neither the trial court nor the prosecution could have "seized" defendant's due process rights.

521 NW2d 275 (1994), citing Const 1963, art 1, § 14.[4] However, "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." *Id*. at 512. "The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others." *Id*. (footnote omitted). "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. Here, the prosecution argued that count IV was proven beyond a reasonable doubt either by the testimony that defendant rubbed his penis in between the crevice of the victim's buttocks and/or because defendant's sperm was found on the rectal swab. This evidence is not materially distinct, and thus, the general unanimity jury instruction given by the trial court was sufficient. There is no plain error.

2. JUDICIAL BIAS

Defendant contends that the trial court was biased towards him. This issue is unpreserved because defendant failed to file a motion to disqualify the trial court within 14 days of the discovery of the alleged grounds for disqualification. MCR 2.003(D)(1)(a). We review unpreserved claims of judicial bias for plain error that affected the defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

"A criminal defendant is entitled to a 'neutral and detached magistrate.'" *Jackson*, 292 Mich App at 597, quoting *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). "A defendant claiming judicial bias must overcome 'a heavy presumption of judicial impartiality.'" *Id*. at 598, quoting *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

> "Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" [*Jackson*, 292 Mich App at 598 (quotation marks and citations omitted).]

In other words, the defendant must show that the trial court possessed an actual, personal, and extrajudicial bias against him. *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996); see MCR 2.003(C)(1)(a).

In his standard 4 brief, defendant cites to the trial court's rulings regarding the amendment of the felony information as evidence of judicial bias. Defendant also cites to the trial court's comment that defendant's discovery requests were deficient before it granted defendant's motion for a mistrial, and the trial court's decision to inform the second jury that the first mistrial was the fault of the trial court. It is well established that judicial rulings and

[4] Const 1963, art 1, § 14 provides, "The right of trial by jury shall remain . . . ."

opinions formed during the proceedings are not valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Wells*, 238 Mich App at 391. Also, critical and/or hostile commentary to counsel and the parties are generally not sufficient to pierce the veil of impartiality. *Id.* Consequently, defendant has failed to overcome the presumption of judicial impartiality because he has not presented evidence of actual, personal, and extrajudicial bias against defendant.

3. DOUBLE JEOPARDY

Defendant argues that he was goaded into a mistrial by the prosecution, and asserts a *Brady*[5] violation. "Unpreserved, constitutional errors are reviewed for plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006). "Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Meshell*, 265 Mich App at 628.

The United States and Michigan Constitutions both protect against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Jeopardy attaches at the time the jury is selected and sworn. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If a mistrial is declared before a verdict, "the Double Jeopardy Clause may bar a retrial." *Id.* However, when the defendant moves for or consents to a mistrial "and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is . . . generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim." *Id.* at 253. Nonetheless, "where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial[,]" retrial is barred. *Id.* If a defendant has sought or consented to a mistrial and later invokes this exception to prevent a new trial, the defendant must establish the prosecutor's intent from "the objective facts and circumstances of the particular case[.]" *Id.* at 257 (quotation marks and citation omitted).

Here, double jeopardy does not bar a retrial because there is no evidence that the prosecution intended to provoke a mistrial. Defendant requested a mistrial after the prosecution produced Johnson's report from her forensic interview with the victim a day after the first jury trial had begun. However, the prosecution informed the trial court that he did not receive Johnson's report until the day he faxed it to defense counsel. The prosecution clarified that he had not thought to ask Johnson if she had a report, and Johnson offered her report to the prosecution only after the prosecution met with Johnson. Moreover, defendant stated on the record that he understood the implication of requesting a mistrial and that he understood that declaring a mistrial would allow for a new trial to begin. Accordingly, the facts and circumstances of this case do not establish that the prosecution intended to provoke a mistrial.

Defendant also argues that the failure of the prosecution to give defendant Johnson's report constitutes a violation of *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). According to *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), "[a]

[5] *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." This Court summarized a *Brady* violation as:

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it 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. [*Cox*, 268 Mich App at 448.]

In this case, defendant admits that the prosecution provided him with the Johnson report, and thus, there was no *Brady* violation.

4. EXPERT TESTIMONY

Defendant argues that Buchanan's expert opinion was based on hearsay because Buchanan used Peterson's medical history of the victim. A preserved evidentiary error is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26 (footnote omitted).

Before expert testimony may be admitted into evidence under MRE 702, the trial court must determine "whether the opinion is rationally derived from a sound foundation." *Unger*, 278 Mich App at 217 (quotation marks and citation omitted). An expert's opinion evidence is not admissible if it is based on "subjective belief or unsupported speculation." *Id*. at 218 (quotation marks and citation omitted). In this case, defendant argues that Buchanan's opinion is based on hearsay because he received the victim's statements of sexual abuse from Peterson.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Generally, hearsay is inadmissible unless it comes within an exception to the hearsay rule." *People v Dendel (On Second Remand)*, 289 Mich App 445, 452; 797 NW2d 645 (2010). MRE 803(4), the medical treatment exception to the hearsay rule, provides:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

"Statements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a

self-interested motivation to be truthful in order to receive proper medical care." *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011). "This is true irrespective of whether the declarant sustained any immediately apparent physical injury." *Id*. at 215. "Particularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *Id*.

In this case, the victim's statements regarding the sexual abuse were reasonably necessary to provide medical treatment to her. Because Peterson, a nurse, was assisting Buchanan, a doctor, by obtaining the victim's medical history, the victim's statements to Peterson were admissible evidence under MRE 803(4). Thus, the trial court did not err in allowing Buchanan to use Peterson's medical history because it was derived from a sound foundation. And regardless, Buchanan testified that his classification of the victim's case as a class four (definite evidence of sexual abuse), was based on defendant's confession that he sexually abused the victim, and not Peterson's history. Thus, even if there was an error, reversal would not be required because it was not outcome determinative.

5. ADMISSION OF EVIDENCE

Defendant argues that the trial court erred in admitting a diagram of the female genitalia into evidence. A preserved evidentiary error is reviewed for an abuse of discretion. *Aldrich*, 246 Mich App at 113. "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 379. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496, quoting MCL 769.26 (footnote omitted).

Demonstrative evidence is used at trial to assist the jury in determining a material issue. *Unger*, 278 Mich App at 247. The admissibility of demonstrative evidence is based on the "traditional requirements for relevance and probative value[.]" *Id*. (quotation marks and citation omitted). In general, all relevant evidence is admissible. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010), citing MRE 402. Relevant evidence is evidence that has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id*. at 236-237, quoting MRE 401. Relevant evidence may be excluded when "'its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id*. at 237, quoting MRE 403.

> Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it

would be inequitable to allow use of the evidence. [*People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (citations omitted).]

At trial, the prosecution asked the victim to color in the areas on the diagram where defendant touched her. After the victim colored the area immediately surrounding the vaginal opening, the prosecution confirmed with the victim that defendant touched the areas immediately surrounding the vaginal opening, but, he did not touch inside the vaginal opening. This evidence was relevant to assisting the jury in determining whether defendant committed penetration, an element of first-degree criminal sexual conduct, because as previously discussed, under MCL 750.520a(r), sexual penetration includes any intrusion, however slight, of the genital opening, including both the vagina and the labia. *Lockett*, 295 Mich App at 188; *Bristol*, 115 Mich App at 238. Moreover, the diagram was not unfairly prejudicial because it was a standard medical diagram of the female anatomy and it merely illustrated the victim's testimony. The trial court did not abuse its discretion in admitting the evidence.

6. SPEEDY TRIAL

Defendant argues that his right to a speedy trial was violated. "Unpreserved, constitutional errors are reviewed for plain error affecting substantial rights." *Pipes*, 475 Mich at 270. A criminal defendant can waive his right to a speedy trial. *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006). "Waiver consists of (1) specific knowledge of the constitutional right and (2) an intentional decision to abandon the protection of the constitutional right." *Id*. at 261. "Courts should indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id*. at 260 (quotation marks and citation omitted).

In this case, defendant waived his right to a speedy trial. On August 8, 2011, defendant requested an adjournment of his second trial because his defense counsel left his firm and no other attorney at the firm had handled defendant's case. Defendant requested that the trial court allow an adjournment so that his original counsel could continue to represent him, and he acknowledged that he was waiving his right to a speedy trial in order to keep the same attorney as his defense counsel. Consequently, defendant's right to a speedy trial was not violated because defendant waived his right.

7. PROSECUTORIAL MISCONDUCT

Defendant alleges several instances of prosecutorial misconduct. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *Brown*, 294 Mich App at 382.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Dobek*, 274 Mich App at 63. "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64.

Defendant argues that he was denied a fair trial when the prosecution purposefully withheld the Johnson report until after the start of the first trial in order to ensure defendant would have to seek a mistrial, by charging him with first-degree criminal sexual conduct, by the

use of the demonstrative evidence, and by vouching for the credibility of the victim. As already discussed, there is no evidence to support defendant's assertion that the prosecution acted purposefully by withholding the Johnson report, nor was there any error in charging defendant with first-degree criminal sexual conduct, or by the use of the diagram. Hence, there was no misconduct.

Defendant also argues that he was denied a fair trial when the prosecution created a jurisdiction defect regarding count IV because the district court never bound defendant over on that charge. As previously discussed, the prosecution acted properly in filing a *Goecke* motion because there was no unfair surprise or prejudice to defendant. Thus, there was no misconduct.

We also reject defendant's argument that he was denied a fair trial when the prosecution appealed to the sympathy of the jury during its closing argument when it discussed the difficulty a child victim may have in relating the intimate details of sexual abuse to strangers. "Appeals to the jury to sympathize with the victim constitute improper argument." *Watson*, 245 Mich App at 591. However, as previously determined, the prosecution's commentary did not seek jury sympathy; rather, the prosecution commentary was an argument regarding the credibility of the victim. There was no misconduct.

Defendant argues that he was denied a fair trial when the prosecution argued facts not in evidence. Specifically, defendant asserts that the prosecution mischaracterized the evidence when it argued that semen was found inside the rectum. Defendant cites to the prosecution's May 9, 2011, comment during a pre-trial motion hearing that the rectal swab was taken "just outside" the rectum in support of his argument.

"A prosecutor may not make a factual statement to the jury that is not supported by the evidence[.]" *Dobek*, 274 Mich App at 66. The prosecution "is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case[.]" *Id*. "The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Id*. Defendant's argument is misplaced. The prosecution's pre-trial statement to the court is not evidence presented at trial. Rather, the evidence from trial established that the rectal swab was taken from the victim's rectal opening. Specifically, while Hoogstra admitted that the rectal swab could have been taken from the anus crevice or inside the anal opening, he also testified that he collected the rectal sample just past the anal sphincter muscle. Based on this evidence, the prosecution was free to argue to the jury that anal penetration occurred. There was no misconduct.

Finally, defendant argues that he was denied a fair trial when the prosecution vouched for the victim's credibility during its closing argument. While the prosecution cannot vouch that he has some special knowledge regarding a witness's truthfulness, *Bahoda*, 448 Mich at 277, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes[,]" *Thomas*, 260 Mich App at 455. A review of the prosecution's closing argument reveals that the prosecution did not suggest that he had special knowledge concerning her truthfulness. The prosecution argued that the victim was a credible witness because she was consistent when describing the sexual assaults. There was no misconduct.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello