STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD NORMAN BEALS,

Defendant-Appellant.

UNPUBLISHED
June 11, 2013

No. 310032
Kent Circuit Court
LC No. 11-005730-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(2)(b). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 25 to 40 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his statutory right to a polygraph examination. We review de novo questions of statutory interpretation. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003).

MCL 776.21(5) provides that "[a] defendant who allegedly has committed a crime under [MCL 750.520b to MCL 750.520e and MCL 750.520g] shall be given a polygraph examination or lie detector test if the defendant requests it." Under MCL 776.21(5), a defendant has an "absolute right to receive a polygraph test once he ma[kes] a request for it." *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). "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 Wilkins*, 267 Mich App 728, 735; 705 NW2d 728 (2005) (quotation and citation omitted).

In this case, defendant's statutory right to a polygraph examination was satisfied. A police detective started a polygraph examination with defendant on December 21, 2011. The detective terminated the examination before completion because of defendant's non-cooperation. The purpose of the statute was served: defendant was given the opportunity, albeit an opportunity that he squandered, to demonstrate his innocence. *Wilkins*, 267 Mich App at 735.

Even if we concluded that defendant was denied his statutory right to a polygraph examination, we would nonetheless affirm defendant's conviction. To warrant reversal,

defendant must demonstrate more probably than not that the denial of the right was outcome-determinative. See *Phillips*, 469 Mich at 396-397. According to defendant, the error was outcome-determinative because a completed polygraph examination would have enabled him to avoid trial.[1] However, the prosecutor pulled the agreement after defendant's non-cooperation. Defendant's reliance on *People v Reagan*, 395 Mich 306; 235 NW2d 581 (1975), for the proposition that the prosecutor was not allowed to pull the agreement is misplaced. In *Reagan*, the Supreme Court held that the prosecutor's office was bound by its agreement with the defendant after the trial court approved an order of nolle prosequi. *Id.* at 319. Here, because defendant did not complete the polygraph examination, the prosecutor never presented an order of nolle prosequi to the trial court, nor did the trial court ever accept a plea to fourth-degree criminal sexual conduct from defendant. Because the prosecutor pulled the agreement, and because the results of a subsequent polygraph examination, if given, would not have been admissible at trial, *Phillips*, 469 Mich at 397, any error by the trial court was harmless.

Defendant next argues that the trial court erred in denying his motion in limine to exclude evidence that he viewed child pornography. According to defendant, the prosecutor did not present sufficient evidence from which the jury could find that he viewed child sexually abusive material, as defined by MCL 750.145c, on the victim's mother's computer. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

MCL 768.27a provides:

> (1) Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If 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 the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means any individual less than 18 years of age.

[1] The prosecutor and defendant had agreed that if defendant passed the polygraph examination, the prosecutor would dismiss the charge, but if defendant failed the examination, defendant would plead guilty to fourth-degree criminal sexual conduct.

Here, the other listed offense is a violation of MCL 750.145c, regarding the production, distribution, or possession of child sexually abusive material. Often the relevancy of evidence is conditioned on a fulfillment of fact. See *Howard v Kowalski*, 296 Mich App 664, 681-682; 823 NW2d 302 (2012). A trial court may admit the evidence upon deciding that the prosecution has presented sufficient evidence from which a jury could find the conditional fact by a preponderance of the evidence. MRE 104(b); *Howard*, 296 Mich App at 682-683. Here, unless child sexually abusive material was viewed on the victim's mother's computer and it was defendant who looked at the material, defendant did not commit another listed offense against a minor and, consequently, evidence of defendant's other acts of looking at child pornography would not be admissible under MCL 768.27a. See *Watkins*, 491 Mich at 494.

We conclude that the prosecutor presented sufficient evidence from which a jury could find by a preponderance of the evidence that defendant viewed child sexually abusive material on the victim's mother's computer. Three websites with suggestive titles were found in a computer file under the mother's sister's profile. As far as the victim's mother knew, defendant, who did not have his own profile on the computer, used the sister's profile. Two of the websites were last accessed in January 2011, a time when no one other than defendant lived with the victim and her mother. No child pornography was found on the victim's mother's computer and there were no descriptions of what defendant viewed in the record. However, a jury can make inferences from the evidence. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Where names of accessed websites suggested that the content of the websites is naked preteens and where defendant admitted that he saw images of children while browsing the internet for pornography that he liked, a reasonable inference from the evidence is that images accessed by defendant on the computer involved children engaged in at least one of the listed sexual acts in MCL 750.145c. In addition, defendant's statement to the detective that he would leave any website as soon as possible when he saw that it contained images of younger children provides the inference that the images defendant viewed were not innocent pictures of children. Under these circumstances, the trial court did not abuse its discretion in holding that evidence of defendant's other acts of looking at child pornography was admissible under MCL 768.27a. *Unger*, 278 Mich App at 216.

Evidence admissible under MCL 768.27a remains subject to the balancing test of MRE 403. *Watkins*, 491 Mich at 481, 486. Under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In applying the MRE 403 balancing test to evidence admissible under MCL 768.27a, a court must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. *Watkins*, 491 Mich at 487. Here, there was similarity between the charged crime, engaging in sexual penetration with a person under the age of 13 years, and the other acts, viewing child pornography, which included pictures of young girls. There was also a temporal proximity between the charged crime, which was alleged to have occurred on or about November 1, 2010, and the other acts. The three websites found on the victim's mother's computer were last accessed in either November 2010 or January 2011. The mother confronted defendant about looking at inappropriate websites after her sisters had moved out, which was before Thanksgiving 2010. Further, the other acts evidence was "highly relevant" because of the propensity inference. *Id.* at 470, 491. Accordingly, the prejudicial effect of the other acts evidence did not substantially outweigh the evidence's

probative value. Evidence of defendant's other acts of looking at child pornography was properly admitted.

Defendant also argues that Dr. Cheryl Tamburello and Thomas Cottrell improperly testified to the truthfulness of the victim's allegations. Because defendant did not raise an objection to Tamburello's alleged improper testimony at a time when the trial court had the opportunity to correct any error, the issue with respect to Tamburello's testimony is unpreserved. See *People v Buie*, 491 Mich 294, 312; 817 NW2d 33 (2012). Similarly, because defendant made no objection to Cottrell's alleged improper testimony, the issue with respect to Cottrell's testimony is unpreserved. See *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). We review unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Plain error, which is error that is obvious or clear, affects a defendant's substantial rights when it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

An expert in child sexual abuse may testify about typical and relevant symptoms of child sexual abuse to explain a victim's specific behavior that might be construed by the jury as inconsistent with that of an actual victim of child sexual abuse. *People v Peterson*, 450 Mich 349, 352, 373; 537 NW2d 857 (1995). In addition, if the defendant attacks the victim's credibility, an expert may testify about the consistencies between the behavior of the victim and other victims of child sexual abuse. *Id.* at 352-353, 373. However, an expert may not testify that sexual abuse occurred, may not vouch for the credibility of the victim, and may not testify that the defendant is guilty. *Id.* at 352, 369.

According to defendant, Tamburello testified to the truthfulness of the victim when, under examination by the trial court, she clarified that she relied on what the victim said to make her diagnosis of probable or possible sexual abuse. However, it must be noted that the testimony Tamburello gave while being questioned by the trial court was generally duplicative of her testimony on cross-examination. On cross-examination, she testified that she will always make a diagnosis of possible or probable sexual abuse if the child makes a clear, consistent, and detailed allegation of abuse. In addition, Tamburello never testified that the alleged sexual abuse by defendant occurred or that the victim was credible. Tamburello's testimony, when read in totality, indicates that she made no credibility determination of the victim, but merely accepted the victim at her word. She also testified on direct examination that, although a normal genital exam is consistent with an allegation of sexual abuse, a normal genital exam did not confirm the possibility of abuse. In addition, the trial court, through its questioning of Tamburello, reinforced to the jury that it was to make its own independent decision whether the victim was credible. Under these circumstances, Tamburello did not testify that sexual abuse occurred or that the victim was credible. There was no plain error in the testimony of Tamburello. *Coy*, 258 Mich App at 763.

Defendant claims that Cottrell testified to the credibility of the victim when he testified that only three children out of the 6,000 child sexual abuse victims treated by the YWCA had made false allegations. We agree that Cottrell's testimony constituted plain error. See *Peterson*, 450 Mich at 375-376 (stating that expert witnesses improperly vouched for the credibility of the victim when they gave statistics regarding how often children make false accusations of abuse). However, the improper testimony did not affect the outcome of trial. *Carines*, 460 Mich at 763.

First, Cottrell's testimony was cumulative of his testimony on cross-examination that a false accusation of sexual abuse was "an extremely rare occurrence." See *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003) (stating that an appellant may not benefit from an error to which counsel contributed by plan or negligence). Second, on further questioning, Cottrell admitted that more than three of the child sexual abuse victims served by the YWCA could have made false accusations because the YWCA does not assess the veracity of disclosures. Cottrell also testified that some studies indicated that children rarely, if ever, falsify accusations of abuse and that other studies indicated that a high percentage of children make false accusations. Third, the trial court instructed the jury that it was their job to determine the facts of the case, a determination that included whether to believe what each witness said. A jury is presumed to follow its instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under these circumstances, the improper testimony of Cottrell did not prejudice defendant. *Carines*, 460 Mich at 763.

In a standard 4 brief, defendant claims that his conviction was not supported by sufficient evidence. We review a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

The victim testified that one night defendant was on top of her and that his "private part" was inside her "private part." It was not a dream, and the victim knew this because she saw defendant on top of her. She was 100 percent certain that it was defendant; it was not her babysitter. Although the victim's genital exam was normal, Tamburello testified that a normal exam neither confirms nor discounts the possibility of sexual abuse. In addition, although the victim delayed in disclosing the abuse and admitted that she agreed at the preliminary examination that the abuse may have been a dream, Cottrell testified that delayed disclosures and recantations are common phenomena in child sexual abuse cases. The jury, by convicting defendant, found the victim credible. We must accept that credibility determination. See *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009); *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Defendant makes no argument that the testimony of the victim, if believed, fails to establish that he committed first-degree criminal sexual conduct. Accordingly, when the evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Cline*, 276 Mich App at 642. Defendant's conviction is supported by sufficient evidence.

Defendant also claims in his standard 4 brief that the district court abused its discretion in binding him over for trial. However, because the prosecutor presented sufficient evidence at trial to convict defendant of first-degree criminal sexual conduct, any possible error in the bindover is harmless. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell