STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2020
v	No. 344591 Kent Circuit Court
WILLIAM ALONZO BURRIS, Defendant-Appellant.	LC No. 17-010339-FH

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

The Sixth Amendment right to counsel commands that an accused "be defended by the counsel he believes to be best." *United States v Gonzalez-Lopez*, 548 US 140, 146; 126 S Ct 2557; 165 L Ed 2d 409 (2006). The right to counsel is so vital that the United States Supreme Court deems it "the root meaning of the constitutional guarantee" to a fair trial. *Id*. at 147-148. "A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Id*. at 150 (emphasis in original). Erroneous deprivation of the right to choose one's counsel is structural error, necessitating a new trial. *Id*.

Only a handful of grounds allow a court to lawfully deny a defendant's right to be represented by a retained lawyer. Relevant here, a court may reject chosen counsel in the interests of protecting the court's trial calendar. But "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violates the Sixth Amendment right. *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983) (cleaned up).[1] The trial court's rulings in this case epitomize "unreasoning and arbitrary insistence upon expeditiousness

[1] This opinion uses the new parenthetical "cleaned up" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

in the face of a justifiable request for delay." Therefore, we must vacate defendant William Burris's convictions and remand for a new trial.

I. FACTUAL BACKGROUND

The prosecution charged that while babysitting his young daughter, AM, and several other children, Burris showed two of the girls adult pornography on his cell phone and asked whether they would like to engage in the acts depicted. AM testified that Burris also touched her breasts and "private part" over her clothing.

AM recounted that she first reported Burris's acts to Jacora Seymore, Burris's girlfriend, in Burris's presence. Seymore denied that any such conversation took place. AM next reported the incident to her mother, Shaunda Carter-Matthews. During this conversation, AM disclosed that Burris had been molesting her for the past two years. Carter-Matthews called the police. Detective Jennifer Wordelman referred AM to the Children's Advocacy Center, where a forensic interviewer, Amy Minton, interviewed her and two of the other girls. Detective Wordelman also referred AM for an examination with a sexual assault nurse examiner.

The prosecutor charged Burris with one count of CSC-II for assaulting AM and two counts of accosting a minor for immoral purposes, one count with regard to AM and one with respect to another of the girls. At the preliminary examination, the prosecutor advised that the prosecution would not pursue the charge of accosting the second girl, but would seek to add a second count of CSC-II for assaulting AM. Burris was bound over for trial. A jury found him guilty of one count of CSC-II and the sole count of accosting a minor for immoral purposes

II. DENIAL OF THE RIGHT TO CHOSEN COUNSEL

A. GUIDING LEGAL PRINCIPLES

The United States Supreme Court's Sixth Amendment jurisprudence leaves no doubt but that representation by counsel of choice should be regarded as the default position when a judge is asked to consider a substitution request. Trial courts "must recognize a presumption in favor of" counsel of choice, and that a litigant's decision to hire his own counsel may be overcome only in limited circumstances. *Wheat v United States*, 486 US 153, 164; 108 S Ct 1692; 100 L Ed 2d 140 (1988). Our Supreme Court, too, has forcefully underscored the importance of honoring this right.

In *People v Williams*, 386 Mich 565, 568; 194 NW2d 337 (1972), the defendant's attorney moved to withdraw from representation on the first day of trial because the defendant had retained a different lawyer. The trial court denied the motion and declared that no continuance would be granted. *Id*. Even though it applied a far more deferential standard of review than the standard

operative today, the Supreme Court held that the trial court reversibly erred by issuing both rulings.[2]

Our Supreme Court reached that result by applying the rule set forth in *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964), which acknowledges that although continuance decisions are traditionally within the trial court's discretion, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." The Court summarized in *Williams*, 386 Mich at 575-576:

> The defendant requested a continuance in this case to obtain a new lawyer. The right to assistance of counsel is a precious constitutional right. It is probably the most important right of any defendant in a criminal trial. . . . This right has been jealously protected by the courts and is of critical importance to any defendant in a criminal trial. Hence, whenever this right is asserted, the trial court must take special care to insure that it is protected." [*Id*. at 576.]

Acknowledging that the trial court's docket may well have been "heavily burdened" due to other events, the Supreme Court nevertheless held that "the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance." *Id*. at 577.

B. UNDERLYING FACTS

On January 22, 2018, attorney Edwin Johnson filed a notice of substitution of counsel, signaling that Burris wished to replace his appointed attorney, Edward J. Lis, with Johnson. The case had reached the circuit court just two months earlier. The trial court dismissed Johnson's appearance after a brief hearing conducted on February 26. The transcript reveals that the trial court made no effort to accommodate Johnson's need for extra time to prepare for trial. Rather, the court insisted on going to trial in 30 days, a timeframe resisted by both Johnson and the prosecutor. After the hearing concluded, the court set the trial for April 23, 2018, more than *60* days out—a period of adjournment never offered to Johnson.

A few weeks before the April trial date, Johnson tried to substitute back into the case. The trial court again denied Burris his right to be represented by counsel of choice. We review the two

[2] In *People v Williams*, 386 Mich 565, 568, 571-572; 194 NW2d 337 (1972), the Supreme Court relied on the abuse of discretion standard described in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), which permitted an appellate court to reverse only when the trial court's decision was "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." The *Spalding* standard entitled the trial court's decision to "the utmost level of deference." *People v Babcock*, 469 Mich 247, 266; 666 NW2d 231 (2003). The standard that now governs provides that "[a]n abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018) (cleaned up).

events separately and in detail, as their illumination reveals the arbitrary nature of the court's rulings and its failure to attribute any legal relevance to Burris's Sixth Amendment right.

1. THE FEBRUARY ADJOURNMENT REQUEST

Attorney Lis represented Burris during the November preliminary examination. At the outset of the exam, Burris expressed dissatisfaction with Lis. Burris complained that Lis had not contacted several witnesses and "he just keeps advising me to waive my preliminary exam[.]" Burris declared, "I don't wanna waive it," despite that the lawyer he intended to hire had asked "to have Mr. Lis postpone it." Because that lawyer had not entered an appearance, the exam went forward. On November 14, Burris waived arraignment in the circuit court.

On December 28, 2017, the circuit court issued a notice setting the case for trial on February 12, 2018. As it happened, Johnson had visited the courthouse the day before to review the file; the trial notice had not yet been issued and did not appear in the file. Johnson was unaware of the February trial date when he filed a substitution of counsel on January 22, 2018. After filing a formal appearance and a discovery demand on February 9, Johnson learned of the February 12 trial date.

On February 12, Johnson appeared before the trial judge and requested an adjournment; this hearing has not been transcribed. An order reflects that the trial court set the matter for trial on February 26. On February 16, Johnson filed a motion to adjourn the trial. He averred that he had a trial scheduled in Kalamazoo County set to begin on February 27, which he expected "to continue for two weeks." Additionally, Johnson asserted, discovery in Burris's case was incomplete, and more investigation was necessary:

> [T]he Prosecution's case is based primarily on information gathered in two Family Court cases that have been dismissed, with Defense having no information regarding why these two lower standard [sic] cases were dismissed, or access to any of the investigators that developed the case.

The parties appeared before the trial court on February 23 to consider the adjournment motion. The transcript reflects that the trial court repeatedly interrupted Johnson, misstated facts, and telegraphed that Johnson would not be permitted to represent Burris. The court made no mention of Burris's Sixth Amendment right at any point during the lengthy colloquy and never sought Burris's input regarding his reasons for seeking the substitution:

> *The Court*: All right. Mr. Johnson, we're set for trial in this matter. This was our second trial date for next Monday. It's now Friday before. And you filed a motion for an adjournment, again. You asked for an adjournment last time. We gave you a couple of weeks. Why are we back here today on an adjournment?
>
> *Mr. Johnson*: We're back here today because, as I informed Your Honor at the last adjournment, I had a prior case scheduled for trial. It's going forward next week as scheduled. I believe the Kalamazoo Circuit Court made contact with you regarding that. At least, that was their intent yesterday.

And, quite frankly, Your Honor, I have not had an opportunity to fully investigate, do witness lists, do anything in this case.

The Court: Well, sir, the Court Rule requires that you submit witnesses within 28 days of trial, is that correct?

Mr. Johnson: That is correct, sir. It isn't - -

The Court: And, sir, when you filed your appearance, you knew there was a trial date, is that not correct?

Mr. Johnson: No, I did not sir. That is not correct.

The Court: You didn't check the . . . court file?

Mr. Johnson: I - - Your Honor, I came to Grand Rapids and pulled a registry of actions on the 27th of December. And there was no trial scheduled at that point in time.

The Court: Well sir, that's not quite correct, according to the Court file.

Mr. Johnson: Well, I've got the registry of actions.

The Court: Sir, I'm . . . looking at the first trial date, the notice was sent out on December 28th for February 12th. According to the court file.

Mr. Johnson: And as I said, Your Honor, I came in - - of course I wasn't on the case at that time. But I am in on the - -

The Court: Well, sir, also, the - - at the preliminary exam, your client was represented by an attorney, Mr. Ed Lis. But . . . he said on the record, that you were the attorney and you had asked for . . . a waiver of the hearing.

Mr. Johnson: That is untrue, sir.

The Court: Well, that's what the transcript says.[3]

Mr. Johnson: Well, . . . I don't care what the transcript says because as you probably know, . . . my substitution of attorney was dated - -

The Court: Jan 19th.

Mr. Johnson: - - January 19th.

[3] Johnson was correct. At the outset of the exam, Burris stated that *Lis* sought the waiver; Johnson had asked that Burris communicate a desire for an adjournment.

The Court: Okay. And - -

Mr. Johnson: And I received notice that it was signed on January 24th.

The Court: And 28 days from January 19th was last week. And you have not filed a witness list, is that correct?

Mr. Johnson: That is correct, Your Honor. How could I - - Your Honor, I think the Court's being a bit unreasonable with this. I did not receive discovery on this case until January 24th. And this is quite a complicated case, Your Honor. And from what I can see, very little was - - was done. A witness list was not developed by Mr. Lis. There is the issue of potential collateral estoppel in this case. This case began - -

The Court: Explain your collateral estoppel in a criminal case, counsel.

Mr. Johnson: This case was started in June of 2017 by a referral from Grand Rapids Police Department to [Child Protective Services] CPS. CPS conducted an investigation, put together a petition, and this petition was dismissed against Mr. Burris - -

The Court: This wasn't a criminal case.

Mr. Johnson: - - on - - I understand it wasn't charge[d] - -

The Court: That was - - that was a CPS.

Mr. Johnson: - - I understand what it was, Your Honor. The case was dismissed on - -

The Court: Well, counsel you've been on - -

Mr. Johnson: Sir, you're not letting me explain.

The Court: Sir, you've been on here 28 days. Over 28 days. And you're telling me you've done nothing on this case?

Mr. Johnson: I - - that's essentially what I'm telling you, Your Honor.

The Court: Well, then why should I allow you to continue as an attorney on this case?

Mr. Johnson: If you want to cause me to withdraw, Your Honor, then that's your choice, but I'm - - I'm saying again, that I'm the choice of this young man to be his attorney, and I have not had an opportunity to do what needs to be done in this case, and, in fact, I'm asking for at least 90 days because we have to pierce the issues of privilege, and subpoena as far as the family court case is concerned.

The fact of the matter is, Your Honor, the State has had this case since June. They're [sic] complaint is based entirely on CPS report that they are mimicking as they go. That case - -

The Court: Have you had - -

Mr. Johnson: - - has been dismissed, Your Honor - -

The Court: Counsel. Have you read the transcript in the preliminary exam?

Mr. Johnson: Yes, I have, Your Honor.

The Court: Okay. They don't make any reference to the CPS case, do they?[4]

Mr. Johnson: I have the discovery - -

The Court: Isn't this case based on the testimony of a young girl?

Mr. Johnson: Based on the testimony of a young girl in the CPS case, Your Honor. That case was dismissed on September 6th. The - - the State took action and filed a complaint against this defendant in October, entirely based on information that was provided in the - - on - - on a abuse and neglect case which was dismissed on a preponderance of evidence standard.

We have to pierce that. I need those witnesses, and I'm sure Your Honor is aware that we have to - - we have to take care of privilege, subpoena, it has to go through Lansing. We're at least 60 - -

The Court: Sir, you - - you - -

Mr. Johnson: - - days away from that.

The Court: - - you have known all this and you're telling me you've done nothing.

Mr. Johnson: No, I have not told you I've done nothing. I said nothing was done until I got this case. And Your Honor, I was in a murder case in Saginaw. I run a one-man office. I do the research. I do the writing. I do the windows. I think it's unreasonable of this Court to demand that less than 30 days after I gave notice, I got notice that my substitution of attorney was signed, that we were supposed to be at trial. And it's just a little over 30 days since I received notice that we were supposed to be here for the second trial.

[4] A detective called as a witness at the preliminary exam testified to having received copies of the CPS reports.

As I said, Your Honor, I'm not ready and can't be ready for at least 90 days because of the work that has to be done on this case - -

The Court: Sir - -

Mr. Johnson: - - in order for my client to be able to exercise his rights.

The Court: - - one of the things that concerns me is - - I notice in your motion to adjourn, you stated that you have a trial in Kalamazoo that will continue for two weeks.

Mr. Johnson: I said, "estimated."

The Court: It's interesting that in Kalamazoo, they say they'll be - - they're starting it on Wednesday and they'll be done next week. . . .

Mr. Johnson: Well, Your Honor, I'm only going by what the prosecution estimated the time of the trial would be. I have two witnesses. We have to go through their - -

The Court: Well, I want to hear from the Prosecutor on this matter.

Ms. Richardson: Well, Your Honor, when it comes to cases with children, I usually give more leeway due to the fact that the last thing I want is it to come back on appeal because he's not prepared, and he does a poor job at trial because of that. And it's ineffective assistance of counsel. Because of his continued statements to me that he's not ready, I have waited to meet with this little girl again to get her prepped up for trial until this afternoon, pending the outcome of this case.

So I do not have an objection for an adjournment. I don't know about 90 days. I think that's a bit lengthy.

The Court: It's never going to be 90 days.

Ms. Richardson: *But I don't have an objection for an adjournment.*

Mr. Johnson: Your Honor, if I may?

The Court: Go ahead.

Mr. Johnson: I'm requesting 90 days because this case is entirely based on CPS - - CPS case that was dismissed, and in order for me to pierce privilege and be able to get the information that I need, what we have, Your Honor - - and I want to explain to you. What I have is a petition that sounds horrible. Witness statements that sound horrible. And then, all of a sudden, I have this case being dismissed on a preponderance of evidence standard. Apparently something happened in between the time that this petition was filed and the time it was dismissed that we're not aware of. I can tell you, in going through the file, that Mr. Lis requested a specific

CPS report from Sequoya Hudnell that has never been received. I can tell you that I have gone - -

The Court: Counsel, why haven't you - -

Mr. Johnson: - - Your Honor - -

The Court: - - filed a motion - -

Mr. Johnson: - - may I finish?

The Court: - - with regards to that?

Mr. Johnson: Your Honor, I just got on the case. I was in a murder case - -

The Court: You've been on the case a month.

Mr. Johnson: Your Honor, I was in a murder case in Saginaw. Okay? I run a one-man office. I can't do it all at one time.

The Court: Counsel, if you can't handle your responsibilities, you shouldn't be assigned to a case.

Mr. Johnson: Then, Judge, you shouldn't sign the appointment - - I mean, the substitution, then.

The Court: Well, I'm going to think twice about it next time. You can guarantee it. And as Chief Judge here, I will make sure that everybody in this Circuit is aware of that.

Mr. Johnson: Your Honor, I have done work here before, and I think that the Court is being absolutely unreasonable. I am not ready and won't be ready for at least 60 and I'm asking for 90 days.

The Court: Renee, what's our schedule look like for 30 days out?

Mr. Johnson: I want the record to reflect that I won't be ready in 30 days, Your Honor. I have a trial that I'm going to be conducting starting next Wednesday.

The Court: All right. I'm going to adjourn this 30 days. If you're not going to be ready, I'm going to remove you from this case, and we'll appoint him a new attorney.

Mr. Johnson: Well, Your Honor, I'm not going to be ready in 30 days, so we might as well do that now.

The Court: You're not - - all right. Then we'll do that now.

Mr. Johnson: Thank you.

The Court: Okay? You're - - excused from this case. We'll appoint Mr. Lis who was on this case previously. We'll try it in 30 days.

Mr. Johnson: Your Honor, and I want the Court to know that if this case goes sideways, I'm going to be addressing this action, too. I think this is totally unreasonable.

The Court: Well, counsel, the next time you file into a case, you ought to know where the case is, when the trial dates are and what's going on.

Mr. Johnson: Your Honor, it shouldn't make a difference.

The Court: And if you say another word, you'll be held in contempt and put in lock up, sir. [Emphasis added.]

Shortly after the hearing concluded the trial court entered an order removing Johnson as Burris's counsel and reappointing Lis. That same day, the trial court entered an order setting the trial date for April 23, 2018, two months later.

The lengthy colloquy transcribed above is notable for the absence of any explanation on the trial court's part for its unwillingness to adjust its trial schedule. Neither the court nor the prosecutor claimed that any witness would be inconvenienced by a delay; the case was then barely three months old.

The abuse of discretion standard requires us to examine whether the trial court's decision to deny an adjournment, thereby precluding representation by Burris's chosen counsel, fell within "the range of reasonable and principled outcomes." The trial court expressed no reason for its denial of the motion that we can perceive, and its ruling lacked any discernable principle other than, perhaps, some unstated form of docket control. Rather, the court appeared myopically intent on exercising its power and expressing hostility mixed with annoyance toward Johnson. Concern for the protection of Burris's constitutional rights was lost in the skirmish. This error, standing alone, mandates a new trial.

2. THE APRIL EVENTS

On March 2, 2018, after learning of the April trial date, Johnson attempted to substitute back into the case. Lis informed him on March 7 that the trial court would not sign the proposed substitution order. On April 16, Johnson filed a motion he styled as one "for reconsideration." His accompanying brief recounted what had occurred in February and explained why he believed more investigation needed to be done at that time.[5] Johnson argued that the trial court's February

[5] In the brief, Johnson asserted that he

> discovered that the case against Defendant[] was built entirely upon two Abuse and Neglect cases that have been withdrawn or dismissed. Knowing that the standard for Abuse and Neglect cases is "a preponderance of the evidence", Petitioner

"conduct was arbitrary, particularly given the prosecution's lack of objections, the desires of the Defendant, the age of the case, and the fact that the trial was rescheduled within the timeframe that Petitioner had requested." He continued, "Given the complexities of the case and the difficulties in getting necessary information from the Department of Health and Human Services, the request for [60] to [90] days to prepare [was] not unreasonable." The trial court denied the reconsideration motion in a written opinion and order, finding that it was improperly filed more than 21 days after the challenged order was entered, and that it presented the same issues ruled on in February.

In his April motion, Johnson made no request for additional time to prepare for the upcoming trial. As retained counsel for Burris, Johnson sought to substitute for Lis. Instead of giving Johnson an opportunity to demonstrate that he was prepared and ready to start trial on April 28, the court summarily dismissed the substance of the motion based on its form.

In *People v Aceval*, 282 Mich App 379, 386-387; 764 NW2d 285 (2009) (cleaned up), this Court explained that the right to be represented by counsel of choice is not absolute, but is subject to "a balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice . . . ." A trial court has "wide latitude" to "balanc[e] the right to counsel of choice against the needs of fairness and against the demands of its calendar[.]" *Id*. at 387 (cleaned up).

The trial court failed to engage in any balancing when it denied Johnson's request to re-enter the case. "Balancing" means considering both sides of a question, weighing their strengths and weaknesses, and articulating a finding that considers the competing interests. The trial judge did not acknowledge Burris's Sixth Amendment right to be represented by counsel of choice, and failed to explain why its calendar or the needs of public would be disserved by allowing Johnson to represent Burris. The trial court abused its discretion in April as well as in February, and in so doing denied Burris his constitutional right to be represented by counsel of choice.

II. ADDITIONAL ERRORS

In addition to his Sixth Amendment argument, Burris raises several evidentiary issues on appeal. To provide guidance for the proceedings on remand, we address them briefly.

A. MRE 404(b)

Burris first challenges the admission of other-acts evidence. The trial court admitted the evidence under MRE 404(b); it failed to analyze the evidence under MCL 768.27a, despite that both parties presented argument regarding its admissibility under the statute.

The evidence in dispute involves two factual scenarios. The first is that Burris began a sexual relationship with the complainant's mother, Shaunda Carter-Matthews, when Carter-

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immediately began attempts to find out why the case was withdrawn or dismissed, and then picked up for criminal prosecution, where the much higher standard, of "beyond a reasonable doubt" is in play.

Matthews was 15 years old. Burris was 31 years old at the time. AM, the complainant, was born of this relationship.

The second factual scenario involved Burris's sexual activity with NE, then age 15, in a hotel room. NE testified that she accompanied Burris to a hotel at the insistence of her cousin, Stacy, who told NE to lie about her age. Burris bought alcohol for NE, and at the hotel supplied her with cocaine and marijuana. Stacy instructed her to take her clothes off; Burris was also naked. Burris asked NE if could perform oral sex on her and invited her to join him in a hot tub, but NE refused both offers. Burris touched her breasts before leaving the hotel.

If this evidence is offered under MRE 404(b) on remand, the trial court must consider whether it is material to an issue other than propensity. "In the context of prior acts evidence, . . . MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998) (emphasis in original). "[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford*, 458 Mich at 387. Evidence is "material" if it is related to any fact that is of consequence to the action. *People v Denson*, 500 Mich 385, 401; 902 NW2d 306 (2017). When the proffered evidence demonstrates only propensity, it must be excluded. *Knox*, 469 Mich at 510.

The prosecutor argued that evidence of both scenarios was relevant to defendant's "intent" to have sexual contact with AM and therefore admissible under MRE 404(b). However, Burris never claimed that he accidently or inadvertently touched AM. Rather, his defense was a general denial that the touching occurred. On remand, if the prosecution offers the evidence under MRE 404(b), the trial court must consider whether the other acts evidence is *material* to the facts actually under contention in the case.

The prosecution may again offer the evidence under MCL 768.27a. If so, the trial court should articulate an analysis of the "considerations" set forth in *People v Watkins*, 491 Mich 450, 487-488; 818 NW2d 296 (2012), which guide whether other-acts evidence admitted under MCL 768.27a is nevertheless subject to exclusion under MRE 403:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive.

The trial court failed to analyze any of the items in this list. Several factors weigh against admitting the evidence. The other acts bore little similarity to the charged acts. Burris's sexual relationship with then 15-year-old Carter-Matthews began nearly a decade before. The other acts

involved older females, were few in number, isolated in time, and appear unrelated. On remand, the trial court will have an opportunity to reconsider the evidence in this light.

B. MRE 803A

Over Burris's counsel's objection, the trial court allowed Carter-Matthews to testify regarding statements AM made a day or two after the charged crimes. Counsel raised a hearsay objection, and the prosecutor responded by arguing that the statements were admissible under MRE 803(3), as depicting AM's "then-existing state of mind and her emotional state." The court admitted them on that basis.

MRE 803(3) provides a hearsay exception for the following evidence:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

"[T]he general use of statements of mind that are based on past events . . . violate the purpose of the rule." *People v Moorer*, 262 Mich App 64, 73; 683 NW2d 736 (2004). AM's statements regarding the assaults constituted recollections of past events or, in other words, statements of memory that were being used by the prosecution to prove remembered facts. The trial court erred by admitting the evidence under MRE 803(3).

The prosecutor now contends that the statements were admissible under the tender-years exception to hearsay, MRE 803A, which provides, in relevant part, as follows:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule . . . .

AM testified that she spontaneously told Jacora Seymore that Burris had touched her. Seymore *denied* that AM had made any such statement. The prosecutor argues that AM's revelations to Carter-Matthews must be considered the "first" under MRE 803A(4).

MRE 803A(4) provides in relevant part:

> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

The prosecution neglected to file a notice of its intent to offer AM's statements under MRE 803A. Consequently, the facts surrounding the proffered evidence—which were critical to its admissibility—were never evaluated or ascertained by the trial court. On remand, when considering the admissibility of the evidence under MRE 803A, the trial court must evaluate whether the proffered statements were, in fact, the "first" corroborative statements made. That is a question of fact and not a question of law. Similarly, the court must determine whether the statements were "spontaneous," as also required under the rule. See *People v Gursky*, 486 Mich 596, 614; 786 NW2d 579 (2010).

III. SUMMARY

The trial court deprived Burris of his Sixth Amendment right to counsel of choice, and that error, standing alone, merits a new trial.

We vacate Burris's convictions and sentence, and remand for a new trial. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

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Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

MARKEY, P.J. (*dissenting*).

Defendant appeals by right his jury-trial convictions of one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (sexual contact with person under 13 years of age), and accosting a child for immoral purposes, MCL 750.145a.[1] Defendant, a fourth-offense habitual offender, MCL 769.12, was sentenced to 25 to 75 years' imprisonment for the CSC-II conviction and 8 to 15 years' imprisonment for the accosting conviction. Because I conclude that the proper resolution of this appeal is to affirm defendant's convictions, I respectfully dissent.

I. FACTS

Defendant's daughter, AM, was at a home belonging to defendant's girlfriend, Jacora Seymore, on June 17, 2017. AM was nine years old at the time. Also in the home were LS, Seymore's eight-year-old daughter, AB, defendant and Seymore's five-year-old daughter, and two other children aged three and two. Seymore left defendant alone to watch the children. According to AM, defendant showed her, LS, and AB adult pornography on his cell phone and asked the girls if they would like to do what was depicted in the photographs. AM testified that defendant touched her breasts and "private part" with his hands over her clothing.

[1] Defendant was found not guilty of an additional count of CSC-II, and a second count of accosting a minor for improper purposes was dismissed on entry of a *nolle prosequi*.

AM testified that she first reported defendant's acts to Seymore while defendant was present. Seymore denied that AM discussed any abuse with her. According to AM, Seymore and defendant were not receptive to the accusation and told her not to tell anyone about what had happened. AM next reported the incident to her mother, Shaunda Carter-Matthews. In this conversation, AM also disclosed that defendant had been molesting her for the past two years. Carter-Matthews called the police. Detective Jennifer Wordelman referred AM to the Children's Advocacy Center, where a forensic interviewer, Amy Minton, interviewed her, as well as LS and AB. Detective Wordelman also referred AM for an examination with a sexual assault nurse examiner, Stephanie Solis.

Defendant was initially charged with one count of CSC-II for assaulting AM and two counts of accosting a minor for immoral purposes, one with regard to AM and one with respect to LS. At the preliminary examination, the prosecutor informed the court that she would not be pursuing the count of accosting LS, but would be seeking to add a second count of CSC-II against defendant for assaulting AM. Defendant was bound over for trial, and a jury found him guilty of one count of CSC-II and the sole count of accosting a minor for immoral purposes.

II. ANALYSIS

A. CHOICE OF COUNSEL

Defendant argues that he was denied the right to counsel of choice when an attorney, whom he retained shortly before trial was set to begin, was dismissed by the circuit court and replaced with an appointed attorney, who had previously represented defendant in the matter. The majority agrees and reverses defendant's convictions.

A court's decision affecting a defendant's right to counsel of his or her choice is reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018) (quotation marks and citation omitted). If a court improperly removes defense counsel, the defendant need not show prejudice to be entitled to relief. *People v Johnson*, 215 Mich App 658, 667-668; 547 NW2d 65 (1996). "[W]hether substitute counsel performed competently is irrelevant." *Id*. at 668-669. "[H]armless-error analysis does not apply where a trial court violates a defendant's Sixth Amendment right to counsel by improperly removing appointed or retained trial counsel . . . ." *Id*. at 669.

The right to counsel, including the right to counsel of one's choosing, is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, §§ 13 and 20; *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). But the right is not absolute; rather, it is subject to "a balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice . . . ." *Id*. at 386-387 (quotation marks, alteration, and citation omitted). A court has "wide latitude" to "balanc[e] the right to counsel of choice against the needs of fairness and against the demands of its calendar[.]" *Id*. at 387 (quotation marks and citations omitted). In *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983), the United States Supreme Court observed:

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel. [Quotation marks and citations omitted.]

Defendant was initially provided appointed counsel, Edward J. Lis, who represented defendant at the preliminary examination held on November 14, 2017. At the preliminary examination, Lis noted that defendant was contemplating retaining attorney Edwin G. Johnson, III. And defendant voiced some dissatisfaction with Lis's representation up to that point. The district court observed, however, that Johnson had not filed a substitution of counsel or an appearance. The district court conducted the preliminary examination and bound defendant over for trial in the circuit court.

A notice of jury trial was mailed out by the circuit court on December 28, 2017, setting the case for trial on February 12, 2018. A substitution of counsel was executed by Johnson and filed in the circuit court on January 22, 2018. On that same date, the circuit court signed and approved the substitution. On February 9, 2018, Johnson filed his appearance in the circuit court on behalf of defendant, but again, the substitution of counsel had become effective approximately two weeks earlier on January 22, 2018. On February 12, 2018, the circuit court mailed out a notice that the trial had been adjourned until February 26, 2018. The notice was sent to Johnson. The reason for the adjournment is not reflected in the record. On February 16, 2018, Johnson filed a motion to adjourn the trial. Johnson sought a 90-day adjournment, while indicating that he needed at least 60 days to properly prepare for trial, research matters, and obtain discovery in relation to an associated parental termination proceeding involving defendant that was dismissed. On February 21, 2018, Johnson mailed a letter to the circuit court with information regarding Johnson's scheduled matters on February 26, 27, and 28, 2018, in other cases in which Johnson was counsel of record. The letter suggested that the circuit court had asked Johnson to supply the information.

On February 23, 2018, a hearing was conducted on the motion to adjourn. As reflected in the majority's extensive quotation from the transcript, the hearing was contentious. Johnson explained that he was unable to proceed with trial the following Monday. Johnson claimed that he had been unable to investigate the matter, prepare a witness list, or, in his words, "do anything in this case." Johnson asserted that he was unaware that a trial date had been set when he first appeared in the case. He had examined the register of actions in December 2017, apparently the day before notice of the February 12, 2018 trial date was sent to the parties. The circuit court asked Johnson if he was indeed claiming that he had "done nothing on this case," and Johnson responded in the affirmative. Johnson explained that he ran a "one-man office." The circuit court noted that it had contacted another court regarding Johnson's representation about having a two-week trial in another case, and the court was advised that the trial was not expected to take that long. Although the prosecution did not object to an adjournment, it believed 90 days was excessive. Eventually, the circuit court stated that it would adjourn the trial for 30 days and that

if Johnson was not prepared at that point, he would be removed from the case. Johnson retorted that the court "might as well do that now" because he could not possibly be ready for trial within 30 days. The circuit court so agreed, removed Johnson from the case and reappointed Lis to serve as defendant's attorney.

After the hearing and ruling, but still on February 23, 2018, the circuit court issued a notice rescheduling the trial for April 23, 2018—60 days later, which is when the trial commenced with Lis as defense counsel. On April 16, 2018, Johnson moved for reconsideration of the circuit court's decision to dismiss him from representing defendant. The motion explained that after receiving notice of the new trial date, Johnson tried to substitute back into the case on March 2, 2018, but was informed by Lis that the circuit court would not sign an order of substitution. Johnson argued that the circuit court's refusal to allow an adjournment was arbitrary and that the court had violated defendant's right to counsel of his choice. The circuit court issued an opinion and order denying the motion. The court explained that in reference to the attempted substitution on March 2, 2018, it was "unclear from the motion which order Mr. Johnson [was] referring to . . . ." The circuit court denied the motion because it was filed more than 21 days after the challenged removal and substitution order was entered and because it rehashed issues raised previously.

On the first day of trial, defendant addressed the court and brought up the question of proceeding to trial with Lis instead of Johnson. The circuit court stated the following:

> Number one, he'd already gotten this adjourned a couple of times, and he indicated he wouldn't be able to try it for several months down the road. Also, quite frankly, your attorney lied to me. He lied about where his commitments were, where he was going to be, what he was involved in. My staff had done some follow up to contact the courts to see if he was actually going to be tied up for the times that he indicated. He was not. I'm not going to allow an attorney to just continually adjourn trial and also be dishonest with me. That is why I removed him. He, in fact, quite frankly—he filed a motion for reconsideration, and he didn't even follow the court rules. It had to be filed within a certain period of time—I think 21 days. He didn't even follow that. So we're proceeding with Mr. Lis today.

Defendant argues that he was denied the right to retained counsel of his choice by the circuit court's actions. I first note that although the circuit court declined to grant a 90-day adjournment, it was ultimately Johnson, not the court, who ended Johnson's involvement in the case when he declared that he would not be able to try the case in 30 days. Under those circumstances, Johnson asked to be removed, and the circuit court obliged.

Johnson substituted in for Lis on January 22, 2018, as approved by the circuit court. With the February 12, 2018 trial date adjourned, the case was set for trial on February 26, 2018, which would have given Johnson a little more than a month to prepare for trial. Although under those circumstances, the trial court could have allowed a further adjournment, I agree with the circuit court that it was troubling that Johnson had essentially done nothing to at least begin preparation for trial during his first 30 days representing defendant. That said, the circuit court was willing to order a second adjournment and give Johnson 30 more days to prepare for trial. Had a 30-day adjournment actually occurred, which would have resulted in a trial date around March 23, 2018, Johnson would have had two months total to prepare for trial, but this was unsatisfactory to

Johnson. I cannot conclude that a two-month period to prepare for the trial was unreasonably short or that the court's decision-making constituted an unreasoning and arbitrary insistence upon expeditiousness. Thus, the circuit court did not abuse its discretion by limiting a second adjournment to 30 days from the scheduled trial on February 26, 2018.

Furthermore, the circuit court believed that Johnson had been deceptive regarding the length of a trial that Johnson indicated that he had in Kalamazoo. On the first day of trial in the instant case, the court appeared to indicate that there had been multiple lies by Johnson regarding his schedule. The circuit court stated that it was not going to continue granting adjournments when an attorney was being "dishonest." I find nothing inappropriate about the court's checking into Johnson's claims regarding his scheduled cases and trials to verify the reasons for the 90-day adjournment request. I find it noteworthy that defendant does not counter in any form or fashion the court's accusations.

On February 23, 2018, after the circuit court had rejected Johnson's request for a 90-day adjournment, the court substituted Lis back into the case. On that date, the court scheduled a trial for April 23, 2018. Johnson had indicated that he needed at least 60 more days to prepare, and a trial date of April 23, 2018, would have given Johnson those 60 days, which is why Johnson later attempted to be substituted back into the case as defendant's attorney and filed the motion for reconsideration, both without success. Only speculation can lead one to conclude that the circuit court abused its discretion. The circumstances might suggest that the earliest that the court could have scheduled the trial, upon the adjournment, was April 23, 2018, and not around March 23, 2018. But although Johnson claimed that he needed at least 60 days to prepare for trial, his request was for a 90-day adjournment, not 60 days. Moreover, the April 23rd trial date was very likely set by a court scheduling clerk without any involvement of the circuit court judge. He or she would simply set the next available date that would allow sufficient time for the trial beyond the 30 day adjournment. And, assuming there were no available March trial dates, we do not even know whether the circuit court was aware of such when it informed Johnson that only a 30-day adjournment would be allowed.

Eventually, the circuit court eventually learned that Johnson claimed he was willing and able to represent defendant at the trial scheduled for April 23, 2018. The court refused to allow him to again seek to take over representation. But, again, I cannot find that the circuit court abused its discretion. The court determined that Johnson had lied to the court and, again, defendant makes no claim on appeal to the contrary. I can fully understand why the court would not give Johnson a 60-day adjournment in light of the claimed deception. An accused's right to counsel of his or her choice must be balanced against the prompt, fair, and efficient administration of justice, and attempts to deceive a court are the antithesis of promptness, fairness, and efficiency. In sum, I conclude that there was no abuse of discretion.

I also note that a trial court may remove retained counsel on a showing of gross incompetence, physical incapacity, or contumacious conduct. *People v Bailey*, __ Mich App __, __; __ NW2d __ (2019); slip op at 7-9. As indicated, Johnson represented that he had done nothing on the case in the month or so since he had been retained. Johnson also stated that he had not checked the register of actions, at least recently, to determine if a trial was set. And, again, the trial court believed that Johnson had lied to the court with respect to the demands of his calendar. As viewed and characterized by the trial court, Johnson's lack of diligence and candor could be

described as gross negligence and contumacious conduct, providing an additional reason for his removal from the case.

B. OTHER-ACTS EVIDENCE

The majority addresses defendant's argument regarding other-acts evidence and directs the circuit court to reconsider its decision to admit the evidence if the prosecution again seeks to have it admitted, whether under MRE 404(b) or MCL 768.27a. The majority provides the circuit court with the framework to use in reassessing the admissibility of the other-acts evidence, coming excruciatingly close to ruling that the evidence was inadmissible and leaving the court with little to no room to rule differently. I disagree with the majority's position concerning the other-acts evidence.

Defendant argues that the circuit court abused its discretion by admitting other-acts evidence (1) that he had sexual intercourse with Carter-Matthews on a regular basis when she was 15 years old, which resulted in her pregnancy with AM, and (2) that defendant had an encounter in a hotel room involving a 15-year-old girl, NE, which included defendant touching NE's breasts. The circuit court admitted the other-acts evidence to prove "intent" under MRE 404(b), absent any discussion of MCL 768.27a, even though the statute and the rule of evidence were both raised by the parties. As indicated below, the circuit court should have analyzed the issue under MCL 768.27a. I conclude that the other-acts evidence was admissible under MCL 768.27a, but I also find that the evidence was admissible under MRE 404(b). Because the circuit court focused solely on MRE 404(b), I shall engage in and begin with an analysis of MRE 404(b).

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). But whether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo. *Id*. When a trial court admits evidence that is inadmissible as a matter of law, the court necessarily abuses its discretion. *Id*. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Other-acts evidence is admissible if it is offered for a proper purpose under MRE 404(b), if it is relevant under MRE 401 and 402 as enforced through MRE 104(b), and if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). With respect to the *VanderVliet* test, the *Denson* Court stated:

> Under the first prong of the *VanderVliet* test, the question is whether the prosecution has articulated a proper noncharacter purpose for admission of the other-acts evidence. The prosecution bears the burden of establishing that purpose.

> MRE 404(b) prohibits the admission of other-acts evidence when the prosecution's only theory of relevance is that the other act demonstrates the defendant's inclination for wrongdoing in general and thus indicates that the defendant committed the conduct in question. On the other hand, such other-acts evidence may be admissible whenever it is also relevant to a noncharacter purpose, such as one of the purposes specifically enumerated in MRE 404(b)(1). [*Denson*, 500 Mich at 398-399 (citations omitted).]

Again, in this case, the circuit court admitted the other-acts evidence for purposes of the prosecution's effort to prove "intent." The crux of the trial concerned whether defendant actually touched AM. But the prosecution was also required to prove beyond a reasonable doubt that defendant *intentionally* touched AM's genital area and/or breasts, or the clothing covering those areas, and that this intentional touching was done *for sexual purposes* or could reasonably be construed as having been done for sexual purposes. MCL 750.520c(1)(a); MCL 750.520a(q) (defining sexual contact); M Crim JI 20.2(2) and (3);[2] *People v Nyx*, 479 Mich 112, 135; 734 NW2d 548 (2007). The other-acts evidence was offered for a proper, noncharacter purpose, i.e., showing that defendant intentionally touched AM's genital and breast areas and that the touching was for a sexual purpose.

The second prong of the *VanderVliet* test—logical relevance—implicates MRE 401 and 402 and is the "touchstone" relative to the admissibility of other-acts evidence. *Denson*, 500 Mich at 400-401. "Other-acts evidence is logically relevant if two components are present: materiality and probative value." *Id*. at 401. "Materiality" requires other-acts evidence to be related to a fact that is of consequence in the case, meaning that the fact sought to be proven must truly be at issue. *Id*. In regard to materiality, the *Denson* Court noted that the prosecution has the burden to prove all the elements of a charged crime beyond a reasonable doubt. *Id*. In *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), our Supreme Court observed:

> It is well established in Michigan that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements, the elements of the offense are always "in issue" and, thus, material. [Citation omitted.]

In this case, I conclude that the other-acts evidence that defendant engaged in sexual touching, contact, and penetration with female minors was material to proving the elements of CSC-II, as elaborated on earlier.[3] The majority is simply wrong by suggesting that "intent" was not material because the defense was that no touching ever occurred and not that there was inadvertent or accidental touching. The majority's analysis ignores the caselaw which provides that all of the

[2] The jury was instructed consistent with the model instructions.

[3] To be clear, the sexual penetration only pertained to the acts against Carter-Matthews.

elements of a crime are material and must be proven regardless of whether the defendant specifically disputes or offers to stipulate to any of the elements.

Concerning the "probative value" component of the second prong of *VanderVliet*, the *Denson* Court explained:

> Evidence is probative if it tends 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. Generally, the threshold is minimal: any tendency is sufficient probative force. In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something other than the defendant's propensity to commit the crime. Thus, although the prosecution might claim a permissible purpose for the evidence under MRE 404(b), the prosecution must also explain how the evidence is relevant to that purpose without relying on a propensity inference. Ultimately, the court must determine whether the prosecution has established some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in the case. If not, the evidence is inadmissible. [*Denson*, 500 Mich at 401-402 (citations omitted).]

I conclude that the other-acts evidence that defendant engaged in sexual touching, contact, and intercourse with female minors made it more probable than without the evidence that defendant intentionally touched AM's genital and breast areas and did so for a sexual purpose.[4] Accordingly, the other-acts evidence had probative value.

The third *VanderVliet* prong of the test provides that the probative value of the other-acts evidence cannot be substantially outweighed by the danger of unfair prejudice. *Denson*, 500 Mich at 398. The third prong simply requires the trial court to employ the balancing process set forth in MRE 403. *VanderVliet*, 444 Mich at 74-75.

Before analyzing MRE 403, I shall first examine MCL 768.27a, considering that MCL 768.27a ultimately also requires consideration of MRE 403. MCL 768.27a(1) provides that "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." Here, defendant was accused of committing a listed offense against a minor, CSC-II, and the other-acts evidence entailed listed offenses against minors, CSC-III and CSC-IV.[5] See MCL 768.27a(2)(a); MCL

[4] "When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category." *VanderVliet*, 444 Mich at 79-80 (quotation marks and citations omitted). "The level of similarity required when disproving innocent intent is less than when proving modus operandi." *Id*. at 80 n 36; see also *People v Mardlin*, 487 Mich 609, 622; 790 NW2d 607 (2010).

[5] The acts against Carter-Matthews constituted CSC-III under MCL 750.520d(1)(a), and the conduct perpetrated against NE constituted CSC-IV under MCL 750.520e(1)(a).

28.722(j), (t), (u)(*x*), and (w)(*iv*) and (*v*). And as discussed above in relation to MRE 404(b), the other-acts evidence was relevant. Furthermore, the fact that defendant was not convicted of any crimes in relationship to the other-acts evidence was not determinative because evidence may be admitted under MCL 768.27a "even if there was no conviction for the other crime." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008).

MCL 768.27a is subject to the balancing test in MRE 403. *People v Watkins*, 491 Mich 450, 486; 818 NW2d 296 (2012). The *Watkins* Court stated:

> Our conclusion that other-acts evidence admissible under MCL 768.27a remains subject to MRE 403 gives rise to the question of proper application. As with any balancing test, MRE 403 involves two sides of a scale—a probative side and a prejudicial side. Propensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence in MRE 404(b). Yet were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a. [*Watkins*, 491 Mich at 486.[6]]

The circuit court analyzed the issue concerning MRE 403 only in the context of answering whether the other-acts evidence was admissible under MRE 404(b), and the court, in conclusory fashion, found that MRE 403 did not preclude admission of the evidence. MRE 403 provides:

> Although 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.

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[6] The Supreme Court added:

> This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Watkins*, 491 Mich at 486-487.]

"All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). MRE 403 prohibits the admission of marginally probative evidence that will likely be given undue weight—that is, "evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect." *Id*. at 75-76 (quotation marks and citation omitted).

In the context of the analysis under MCL 768.27a, because other-acts evidence could be presented to show defendant's propensity and character for committing CSC-II and accosting a child, I cannot conclude that the probative value was substantially outweighed by the danger of unfair prejudice. The sexual assault of NE by defendant was very similar to the acts perpetrated against AM. And the sexual acts committed against Carter-Matthews went much further, were frequent in occurrence as part of an ongoing "relationship," and were supported by extremely reliable evidence, as the sexual acts resulted in pregnancy and AM's birth. Additionally, the sexual touching of NE took place in 2016 and the alleged sexual assaults against AM occurred in June 2017 and during the two years preceding that June 2017 assault; therefore, there was close temporal proximity between defendant's actions. Furthermore, there were no "intervening acts" that would weigh in favor of excluding the other-acts evidence. See *Watkins*, 491 Mich at 487-488. The other-acts evidence was admissible, and defendant received the benefit of an inaccurate jury instruction that the jurors were not to consider the evidence for purposes of propensity. The circuit court gave this erroneous instruction because it failed to analyze the issue under MCL 768.27a, even though the statute was raised by the parties.

With respect to MRE 404(b), although a closer call because the other-acts evidence could not be considered for purposes of propensity, the evidence was nonetheless probative of whether defendant intentionally touched AM's genital and breast areas and whether he did so for a sexual purpose, effectively encompassing two elements of CSC-II. M Crim JI 20.2(2) and (3). The other-acts evidence was thus more than marginally probative and this probative value was not *substantially* outweighed by the danger of *unfair* prejudice, even though the evidence was somewhat prejudicial. Moreover, even if the other-acts evidence was not admissible under MRE 404(b), "in cases in which the statute applies, it *supersedes* MRE 404(b)." *Watkins*, 491 Mich at 477 (emphasis added). In sum, I conclude that reversal is unwarranted.

C. HEARSAY CHALLENGE – AM'S STATEMENTS TO CARTER-MATTHEWS

Defendant argues that the circuit court abused its discretion by allowing Carter-Matthews to repeat statements made to her by AM the day after the sexual assault on June 17, 2017. The majority addresses this issue, and while it does not resolve the matter, it appears to hint at a desired ruling on remand of inadmissibility. The challenged statements include AM's disclosures that defendant touched her in the genital and breast areas over her clothes and that he had been sexually assaulting her for a couple of years. The circuit court admitted the testimony pursuant to MRE 803(3), which, regardless of the declarant's availability, provides a hearsay exception for the following evidence:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief

> to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

"[T]he general use of statements of mind that are based on past events . . . violate the purpose of the rule." *People v Moorer*, 262 Mich App 64, 73; 683 NW2d 736 (2004). AM's statements regarding the assaults constituted recollections of past events or, in other words, statements of memory that were being used by the prosecution to prove remembered facts. I agree with the majority that the circuit court erred by admitting the evidence under MRE 803(3).

In the alternative, the prosecutor contends that the statements were admissible under the tender-years exception to hearsay, MRE 803A, which provides, in relevant part, as follows:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
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> (1) the declarant was under the age of ten when the statement was made;
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> (2) the statement is shown to have been spontaneous and without indication of manufacture;
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> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
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> (4) the statement is introduced through the testimony of someone other than the declarant.
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> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. . . . .

I would hold that Carter-Matthews's testimony regarding AM's statements would have been admissible under MRE 803A. AM was under the age of ten when she made the statements. Further, the testimony by Carter-Matthews reflected that AM's statements were spontaneous and without indication of manufacture.[7] Also, while there was a short delay between the incident and AM telling Carter-Matthews about the sexual assault, the evidence indicated that the delay was caused by fear.[8] And the statements were introduced through the testimony of someone other than declarant AM, i.e., Carter-Matthews.

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[7] Our Supreme Court has held "that MRE 803A generally requires the declarant-victim to initiate the *subject of sexual abuse*." *People v Gursky*, 486 Mich 596, 613; 786 NW2d 579 (2010). AM did just that in her conversation with Carter-Matthews.

[8] Carter-Matthews testified that AM told her, initially, that she could not say what had occurred because she was "scared."

The parties' arguments regarding MRE 803A are focused on the statutory language that "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule." AM claimed that she first disclosed defendant's sexual assault to Seymore and then next informed Carter-Matthews about the assault. Defendant thus contends that the corroborative statements made to Carter-Matthews were not the *first* corroborative statements made by AM. The prosecution argues that because Seymore did not testify to AM making corroborative statements and specifically denied AM's claim that she divulged the abuse to Seymore, the first corroborative statements for purposes of MRE 803A were necessarily those made to Carter-Matthews.

Under defendant's construction of MRE 803A, no one would or could ultimately testify to corroborative statements in this case under MRE 803A, considering that if it is determined that corroborating statements were made to Seymore, Carter-Matthews could not testify to subsequent corroborating statements, yet Seymore's testimony would also lack any revelation of corroborating statements. MRE 803A plainly presupposes a situation in which two or more witnesses, other than the declarant, are actually prepared and willing to testify to corroborating statements, mandating that only the witness who first heard corroborating statements by the declarant may testify to the statements. MRE 803A provides that "only the first [corroborating statement] *is admissible*." (Emphasis added.) This language clearly envisions competing testimonies of corroborating statements. Because a corroborating statement must be introduced by someone other than the declarant, and because Seymore denied that AM made any corroborating statements, there was *nothing to potentially admit regarding corroboration* for purposes of MRE 803A in relation to Seymore's testimony.

In sum, even though the circuit court erred by admitting the testimony under MRE 803(3), Carter-Matthews's testimony concerning AM's corroborating statements was admissible under MRE 803A. See *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (1999) (even though the trial court erred by admitting hearsay statements under MRE 804[b][3], the statements were admissible under MRE 803[3], and we may affirm where the trial court reached the right result, albeit for the wrong reason).[9]

[9] The majority states that the prosecution failed to give notice of its intent to offer the testimony under MRE 803A. MRE 803A provides that "[a] statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." In his brief, defendant argues that the evidence was not admissible under MRE 803A, but he makes no claim that it was inadmissible because of a lack of notice. Moreover, even if the testimony was inadmissible, I could not conclude that defendant was prejudiced given the strength of the untainted evidence of guilt. See MCL 769.26.

III. CONCLUSION

For purposes of this dissent, it is unnecessary for me to address and analyze the remaining arguments raised by defendant, none of which warrants reversal. For the reasons discussed above, I disagree with the majority's ruling reversing defendant's convictions. I would affirm the convictions. Accordingly, I respectfully dissent.[10]

/s/ Jane E. Markey

[10] I do believe that it is necessary for the majority to address defendant's argument regarding the sufficiency of the evidence, which I conclude fails, because a successful sufficiency argument by defendant would result in a full acquittal, not simply a new trial.