STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN OTTO DICKERSON,

Defendant-Appellant.

UNPUBLISHED
May 27, 2021

No. 352656
Livingston Circuit Court
LC No. 18-025362-FC

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant, Steven Otto Dickerson, was convicted by a jury of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (penetration during commission of other felony), third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (force or coercion), and first-degree home invasion, MCL 750.110a(2). The trial court sentenced him to serve 135 months to 40 years' imprisonment for CSC-I, 10 to 15 years' imprisonment for CSC-III, and 10 to 20 years' imprisonment for first-degree home invasion. Defendant appeals by right. We affirm.

I. BACKGROUND

The complainant and defendant used to date and have two young children in common, for whom they shared custody on an alternating-week basis. Defendant's convictions arise out of a September 28, 2018 child exchange. The complainant was sharing a house with her brother, and defendant came to the house at approximately midnight to pick up the children. The parties carried the children and their belongings to defendant's car. After the children were loaded into the car, defendant, who suspected that the complainant was engaging in romantic relations with other men, pursued the complainant back into her house and started yelling and telling her to give him her mobile phone, which she had hidden. The complainant testified that she did not give defendant permission to enter her home, nor did she want him to do so. During a previous argument, the complainant had hidden her phone in her pants, so defendant began to search the complainant's body for the phone; she tried to push him away, but he then pulled her pants down to see if her phone was hidden in her pants. When he could not find the phone, he pushed her backwards onto the bed and inserted his fingers into her vagina. She told him to stop. Defendant relented when

the complainant's brother's dog came into the room and began barking. The complainant told defendant to leave, but he did not leave immediately. Defendant eventually left, and later that day the complainant contacted the police.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to prove beyond a reasonable doubt that he was guilty of CSC-I and first-degree home invasion. We disagree.

This Court reviews de novo challenges to the sufficiency of the evidence. *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019). To decide "whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). "The prosecution need not negate every theory consistent with innocence, but is obligated to prove its own theory beyond a reasonable doubt, in the face of whatever contradictory evidence the defendant may provide." *People v Chapo*, 283 Mich App 360, 363-364; 770 NW2d 68 (2009).

CSC-I is governed by MCL 750.520b, which provides in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.

Defendant's conviction was based on his engaging in sexual penetration during the commission of first-degree home invasion. First-degree home invasion is governed by MCL 750.110a, which provides in relevant part:

> (1) As used in this section:
>
> * * *
>
> (c) "Without permission" means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.
>
> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling,

> commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> * * *
>
> (b) Another person is lawfully present in the dwelling.

Defendant claims the prosecution failed to prove beyond a reasonable doubt that he entered the complainant's home without permission, and thus, his convictions of CSC-I and first-degree home invasion are not supported by sufficient evidence. We disagree.

When viewed in a light most favorable to the prosecution, the evidence was sufficient to prove beyond a reasonable doubt that defendant did not have permission to enter the complainant's home at the time he digitally penetrated her against her will. The complainant testified in regard to an incident that occurred during the child exchange immediately before the September 28 exchange. She stated that defendant threatened to break her phone, threw items at her car, and chased her around the neighborhood in his vehicle. She called 911 and asked for a civil standby. Additionally, she indicated that, for the September 28 exchange, she locked the door before defendant arrived, and brought the children out to defendant one at a time because she did not want him in her home. She testified that she attempted to close the door before defendant entered the house, she did not give him permission to enter the house, and she did not want him to enter the house. While clearly a reticent witness for the prosecution at trial, she acknowledged that she told the police that defendant put his foot in the door and pushed his way in and that she was not lying when she said that. She reported that once he was in the house, defendant demanded to see her cell phone; however, she had hidden it before he arrived. Defendant started patting her down in an attempt to locate the phone, and she pushed him and told him to get away. After the assault, defendant would not let her leave the house, so she went through a window to check on the children who were asleep in the car. There was also testimony that she sought to obtain a personal protection order against defendant. Moreover, she testified that her brother's large dog was loose and that she generally put the dog in her brother's room when defendant was over because the dog did not like him. This evidence supported an inference that the complainant did not intend to have defendant in her house. "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

The complainant acknowledged that she previously testified that defendant followed her into the house while she walked in and that she did not say in her written statement that defendant put his foot in the door. However, the jury was "free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012). Moreover, there were contradictions in the complainant's testimony. However, when a conviction is based on contradictory testimony, we defer to the jury's decision unless the "testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ." *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (quotation marks and citation omitted). The complainant also acknowledged that defendant was previously given freedom to enter and exit the house without permission. However, "[t]he prosecution need not negate every theory

consistent with innocence" as long as it provided sufficient evidence of its own theory. *Chapo*, 283 Mich App at 363-364. It is also true that the complainant struggled to remember what happened and frequently needed to have her memory refreshed. However, this creates a question of credibility, and it was the jury's responsibility to assess her credibility. *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007).

B. WAIVER OF RIGHT TO TESTIFY

Defendant argues that he was deprived of his right to testify in his own defense. We disagree. "We review for clear error the trial court's factual findings surrounding a defendant's waiver. However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

"A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011) (citation omitted). "However, if a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *People v Spaulding*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348500); slip op at 10 (quotation marks and citation omitted). Indeed, "the right to testify must be affirmatively claimed." *Id*. (emphasis omitted). "[F]ailing to express a wish to testify, if there was an opportunity to do so, is sufficient to 'acquiesce' in trial counsel's decision not to call a defendant to the stand." *Id*.

Defendant argues that his right to testify was violated because his attorney did not discuss the possibility with him until the second day of trial and he therefore was unprepared, but the record does not contain any support for defendant's argument. During the trial, defendant unambiguously and unequivocally waived his right to testify. Defendant was placed under oath and stated that he understood that he had "an absolute right to testify," that he had discussed "the pros and cons" with his attorney, that he understood that it was his choice, and that he did not want to testify. Defendant did not express any desire to testify and did not state that he felt unprepared to do so. At sentencing, defendant did express regret about having chosen not to testify, and he did state that he believed the decision was ill-informed, but he stated unequivocally that it was his decision. While defendant did not testify at the *Ginther*[1] hearing, his trial counsel did, and his trial counsel testified that he had three or four conversations with defendant about the possibility of his testifying. Defendant argues that his attorney predetermined that he would not call defendant as a witness. Even if this were true, it would not constitute a violation of his right to testify because a defendant waives his right to testify by acquiescing in his attorney's decision not to call him as a witness, and there is no evidence that defendant's attorney did anything to prevent him from testifying.

[1] *People v Ginther*, 390 Mich 436, 445; 212 NW2d 922 (1973).

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied his right to the effective assistance of counsel because his attorney did not effectively cross-examine the complainant. We disagree. Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Id*.

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for trial counsel's errors." *Id*. (quotation marks and citation omitted; alteration in original). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Traver*, 328 Mich App 418, 422-423; 937 NW2d 398 (2019) (quotation marks and citation omitted). We presume counsel was effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539.

Defendant argues that his trial counsel was ineffective because the complainant at one point told police that she took one of the children out to the car, and defendant's attorney did not cross-examine her about whether she closed the door, locked the door, or brought keys with her while she did this. The cross-examination of witnesses is a matter of trial strategy. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). However, "[c]ounsel may provide ineffective assistance if counsel unreasonably fails to develop the defendant's defenses by adequately impeaching the witnesses against the defendant." *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014).

Upon review of the record, we conclude that defense counsel reasonably cross-examined and impeached the complainant, and defendant has failed to overcome the presumption of effective performance. Defense counsel cross-examined the complainant about her inconsistent statements from the preliminary examination. He cross-examined her about the fact that she did not lock the door during past exchanges. He also cross-examined her about the fact that defendant generally had freedom to enter and exit the house without permission. Defense counsel testified at the *Ginther* hearing that he did not think there would be any benefit to asking about whether the complainant brought either child to the car or whether she closed and locked the door while doing so. This was a reasonable strategic choice, and we do not second-guess trial counsel's strategic choices.[2] Even if defense counsel cross-examined the complainant about whether she closed and locked the door, defendant has presented us with no basis upon which to conclude that the outcome of the trial would have been different. As noted above, defense counsel thoroughly explored on

[2] Notably, the complainant admitted at trial that she did not want defendant, the father of her children, convicted of the charged criminal offenses. Defense counsel testified that because the complainant was giving several defense-friendly statements, but also stuck to her guns about certain statements, he had to gauge how much to impeach or undermine her statements.

cross-examination the possibility that defendant had received implied consent to enter the house. Moreover, the complainant repeatedly stated that she could not remember the details from the night in question, and we see no reason to believe that she would have remembered whether she brought a child to the car or whether she closed and locked the door while doing so.

D. SENTENCING

Defendant argues that the trial court improperly scored 10 points for OV 4. We disagree. The trial court's factual findings when scoring the guidelines are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Defendant agreed to the scoring of OV 4 at the sentencing hearing, and he has not raised this issue in a motion for resentencing or in a motion to remand. The issue therefore is unpreserved. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Unpreserved scoring errors are reviewed for plain error affecting substantial rights. *Id*. at 312. A plain error occurs if three requirements are "met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted).

Criminal defendants are entitled to a sentence that is based on accurate information and accurate scoring of the sentencing guidelines. *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). A defendant is entitled to resentencing if there is a scoring error that alters the defendant's recommended minimum sentence range under the guidelines. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). "Offense variable 4 is psychological injury to a victim." MCL 777.34. A judge must score 10 points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a). "In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). "The trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014). A psychological injury must actually occur, and OV 4 cannot be scored on the basis of a belief that a serious psychological injury would ordinarily be suffered as a result of the defendant's crime. *People v White*, 501 Mich 160, 162; 905 NW2d 228 (2017). Moreover, while it is a relevant consideration, the fact that the victim experienced fear *during* the commission of the sentencing offense is not alone sufficient to justify scoring 10 points for OV 4. *People v Lampe*, 327 Mich App 104, 114; 933 NW2d 314 (2019).

In the present case, the trial court did not clearly err by finding by a preponderance of the evidence that the complainant suffered a serious psychological injury. The complainant stated that being a victim had caused her to lose sleep, struggle with daily tasks, and "look over her shoulder." Defendant argues that these psychological symptoms were not affirmatively linked to the offense and could have been the result of being a single mother or work stress, rather than the result of being a crime victim. However, given the context of the statements and given her feelings of paranoia, the trial court did not clearly err by finding otherwise.

E. PROSECUTORIAL ABUSE OF DISCRETION

In his Standard 4 brief[3], defendant argues that the prosecutor abused its discretion by dividing a single criminal incident into an unreasonable number of components, resulting in multiple convictions and excessive punishment. According to defendant, the prosecutor should only have charged him with one count of criminal sexual conduct, rather than three offenses. Specifically, he suggests he should only have been charged with CSC-III. We disagree.

Prosecutorial charging decisions are reviewed for an abuse of power. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). An abuse of power occurs if the charging decision is made for reasons that are unconstitutional, illegal, or ultra vires. *Id*. Defendant "failed to preserve this issue for appeal by raising it in the trial court." *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). As a result, we review this claim for plain error. *Id*.

"The prosecutor is given broad charging discretion . . . to bring any charges supported by the evidence." *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). In this case, defendant was accused of forcing his way into complainant's home and digitally penetrating her. Although this case involves one act of penetration, "[a] single act may be an offense against two statutes." *Blockburger v US*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) (quotation marks and citation omitted). CSC-I and CSC-III are separate offenses for which a defendant can be properly convicted on the basis of one act of penetration. See *People v Garland*, 286 Mich App 1, 6; 777 NW2d 732 (2009) (explaining that "CSC I and CSC III are separate **offenses** for which [the] defendant was properly convicted and sentenced, without violating [the] defendant's double jeopardy protection against multiple punishments"). Moreover, there was evidence that defendant forced his way into complainant's home, pushed her down on a bed, and then forcibly penetrated her. As a result, there was evidence to support the first-degree home invasion charge, the related CSC-I charge, and the CSC-III charge. See *Nichols*, 262 Mich App at 415.

F. LIFETIME ELECTRONIC MONITORING

Defendant also argues in his Standard 4 brief that the trial court erred in sentencing him to lifetime electronic monitoring (LEM) under MCL 750.520n. Moreover, even if the statute pertaining to LEM was applicable to him under the circumstances, the trial court erred in amending his judgment of sentence to add LEM without defendant being present, depriving him of due

[3] See Supreme Court Administrative Order No. 2004-6, 471 Mich c (2004).

process.[4] Defendant failed to raise this issue in the trial court; therefore, our review is for plain error. *Hawkins*, 245 Mich App at 447.

Defendant points out while MCL 750.520b(2)(d) states that "in addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to [LEM] under [MCL 750.520n]," MCL 750.520n(1) provides that a "person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to [LEM] . . . ." In other words, while Section 520b seems to provide for LEM for any conviction under subdivision (a) or (b), Section 520n appears to limit LEM to crimes involving defendants 17 or older against victims less than 13 years of age. While defendant raises an interesting issue that this Court struggled with in 2012,[5] in *People v Comer*, 500 Mich 278, 287-292; 901 NW2d 553 (2017), our Michigan Supreme Court dispositively answered the question and rejected the argument defendant now raises, through the following analysis:

> We first address whether defendant is subject to lifetime electronic monitoring by virtue of his CSC–I conviction for a sexual penetration that occurred under circumstances involving the commission of another felony. Punishment for this offense is governed by MCL 750.520b(2), which provides:
>
> > (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
> >
> > (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
> >
> > (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
> >
> > (c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.

[4] The trial court initially sentenced defendant on May 20, 2019, and the judgment of sentence did not impose LEM. On June 19, 2019, the trial court issued an amended judgment of sentence that imposed LEM pursuant to MCL 750.520n.

[5] See *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012) and *People v King*, 297 Mich App 465; 824 NW2d 258 (2012).

> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

MCL 750.520n addresses lifetime electronic monitoring. Subsection (1) provides:

> A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.

We begin, as we must, with the statutory language. Section 520b(2) governs the punishment imposed for all persons convicted of CSC–I. The first three subdivisions address the terms of imprisonment imposed for CSC–I. Generally, CSC–I is punishable by imprisonment for life or any term of years, with two exceptions. Under the first exception, CSC–I offenses committed by an individual 17 years of age or older against an individual less than 13 years of age are also subject to a 25–year mandatory minimum sentence. The second exception, which is not at issue here, specifies that certain repeat offenders must be imprisoned for life without the possibility of parole.

In addition to imprisonment, the Legislature has imposed lifetime electronic monitoring as an additional punishment for a CSC–I conviction. Under § 520b(2)(d), the trial court shall sentence a defendant to lifetime electronic monitoring as provided by § 520n "[i]n addition to any other penalty imposed under subdivision (a) or (b)...." The disjunctive term "or" signals that there are two circumstances in which lifetime electronic monitoring must be imposed under MCL 750.520b(2). Lifetime electronic monitoring must be imposed (1) when a defendant receives a sentence of life in prison or any term of years under § 520b(2)(a); *or* (2) when a defendant also receives a mandatory minimum sentence under § 520b(2)(b) because the crime was "committed by an individual 17 years of age or older against an individual less than 13 years of age." Thus, the Legislature has mandated lifetime electronic monitoring for all CSC–I sentences except when the defendant is sentenced to life without the possibility of parole under § 520b(2)(c). To conclude otherwise, as defendant urges, and limit lifetime electronic monitoring only to sentences imposed under § 520b(2)(b) would impermissibly render the Legislature's reference in § 520b(2)(d) to "any other penalty imposed under subdivision (a)" nugatory.

Reading § 520b(2)(d) in the context of the entire legislative scheme similarly demonstrates the Legislature's intent to mandate lifetime electronic monitoring for all CSC–I sentences in which the defendant has not been sentenced to life without parole. Section 520b(2)(d) is located in Chapter LXXVI of the Michigan Penal Code, MCL 750.1 *et seq*. This chapter is titled "Rape" and sets forth the elements and punishments for offenses involving criminal sexual conduct. Immediately following § 520b is § 520c, which addresses criminal sexual conduct in the second degree (CSC–II). Similar to sentences for CSC–I, the Legislature has also mandated that courts impose lifetime electronic monitoring as part of CSC–II sentences, albeit in more limited circumstances. The relevant provision, MCL 750.520c(2)(b), provides:

> In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.

Under this provision, lifetime electronic monitoring is only mandated for CSC–II convictions when the offender was 17 years of age or older and the victim was less than 13 years of age. In contrast, § 520b contains no such limitation. Because the Legislature has specifically limited lifetime electronic monitoring for CSC–II offenders to sentences arising from specific age-based offenses, we will not read an identical limitation into § 520b where the Legislature did not see fit to include it.

Finally, we note that in analyzing this issue, lower courts and the parties in this case have focused extensively on when lifetime electronic monitoring may be imposed under § 520n(1). Their arguments have primarily been concerned with the effect of the modifying phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" in § 520n(1). We reject defendant's invitation to read this phrase as restricting lifetime electronic monitoring to CSC–I and CSC–II sentences for offenses committed by an individual 17 years of age or older against an individual less than 13 years of age. Generally, a modifying clause is confined solely to the last antecedent unless a contrary intention appears. There is no such intention here. Applying this general rule to determine that the age limitation only applies to convictions for CSC–II is entirely consistent with the statutory analysis above. Instead, it is defendant's reading that fails to give effect to every phrase and clause in the statutory scheme. In addition to rendering part of § 520b(2)(d) nugatory, interpreting § 520n(1) to add an age limitation to both § 520b and § 520c would improperly render the specific age limitation in § 520c(2)(b) surplusage. Therefore, we hold that under § 520b(2)(d), lifetime electronic monitoring must be imposed for all defendants convicted of CSC–I except where the defendant has been sentenced to life without the possibility of parole under § 520b(2)(c). [alterations in original; footnotes omitted.]

Simply put, defendant's argument lacks merit. With respect to defendant's allegation that he was entitled to be present at the time the trial court amended his judgment of sentence to include lifetime electronic monitoring, we agree that the trial court erred by issuing an amended judgment of sentence without giving the parties notice. However, this error did not affect defendant's substantial rights. *Carines*, 460 Mich at 763.

MCR 6.435, in pertinent part, provides

> *(A) Clerical Mistakes*. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

> *(B) Substantive Mistakes*. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

At defendant's sentencing hearing, the trial court informed defendant that he was subject to LEM because he was convicted of CSC-I. Additionally, the presentence investigation report indicated that defendant would be ordered to submit to lifetime electronic monitoring. However, the initial judgment of sentence that was entered on May 20, 2019 did not have the box checked for lifetime electronic monitoring. On June 19, 2019, the trial court entered an amended judgment of sentence, on its own initiative, with the box for lifetime electronic monitoring checked. Therefore, in this case, unlike in *Comer*, 500 Mich at 293, defendant was aware that his sentence included lifetime electronic monitoring. Accordingly, the trial court's correction was clerical in nature, but there is nothing in the record indicating that the court provided any kind of notice to the parties before issuing the amended judgment of sentence. As a result, we conclude that the trial court failed to comply with the requirements of MCR 6.435(A). Nonetheless, this error did not amount to plain error affecting defendant's substantial rights because it did not affect the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Defendant was aware that he was subject to lifetime electronic monitoring and the trial court entered a corrected judgment of sentence one month after the initial judgment of sentence. MCR 6.435(A) does not indicate that it was necessary for defendant to be present when the court entered the amended judgment of sentence. Therefore, he is not entitled to relief on this ground.

G. CUMULATIVE ERROR

Finally, defendant argues in his Standard 4 brief that he was deprived of the effective assistance of counsel due to multiple errors "resulting in a cumulative effect." He first notes that trial counsel failed to file a motion in limine in order to protect defendant from being impeached with evidence of his prior crimes should he take the stand, and that failure to do so, combined with bad advice based on trial counsel's misunderstanding of the law, led to defendant not taking the stand in his own defense, prejudicing him. He also claims his counsel was ineffective in failing to impeach the complainant at trial when she said she did not remember how she received a scratch on her leg during the incident, whereas she testified at the preliminary examination that she was not physically injured during the incident, and the trial court scored points for OV 3. However, defendant fails to cite any authority or legal analysis in support of either contention. A defendant is not permitted to leave it up to this Court to search for authority to sustain or reject his or her position. *People v. Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

At any rate, defendant's claim concerning his criminal history was addressed and rejected by the trial court in its order denying the motion for a new trial. However, the parties did not address the specific argument that defendant now raises in his Standard 4 brief, that evidence relating to his prior domestic violence convictions was not admissible because they were all more than 10 years old. The trial court concluded that a motion to suppress would have been frivolous because the prosecutor "would have been permitted to present every prior domestic violence conviction Defendant has had in the last ten years, and argue to the jury that Defendant had a propensity for domestic violence."

MCL 768.27b(1), in pertinent part, states:

> [I]n a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE 403].

"[I]n cases of domestic violence, MCL 768.27b, permits evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act." *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). However, MCL 768.27b(4) prohibits "[e]vidence of an act occurring more than 10 years before the charged offense . . . unless the court determines that admitting this evidence is in the interest of justice."

Defendant's presentence investigation report shows that between 2004 and 2008, defendant received three domestic violence convictions, one assault and battery conviction, one felonious assault conviction, and one conviction for disorderly person - jostling. Defendant's disorderly person conviction occurred on October 8, 2008. The instant offense occurred on September 28, 2018. The prosecutor did not question defendant in relation to any of these convictions because he declined to testify. From the existing record, it is unknown what evidence the prosecutor would have sought to present or whether the trial court would have allowed evidence relating to the older convictions pursuant to MCL 768.27b(4). Nonetheless, the prosecutor could have questioned defendant about the October 8, 2008 conviction because it was within 10 years of the instant charged offense. Defendant could also be questioned about previous acts of domestic violence involving the complainant. Moreover, before trial, the prosecutor provided written notice pursuant to MCL 768.27c(3), indicating that it sought to present evidence relating to statements that the complainant made to law enforcement officers involving previous incidents of domestic violence perpetrated by defendant. "In MCL 768.27c, the Legislature determined that under certain circumstances, statement made to law enforcement officers are admissible in domestic violence cases." *People v Meissner*, 294 Mich App 438, 445; 812 NW2d 37 (2011). Therefore, the prosecutor would have been permitted to question defendant about such statements. Finally, as discussed earlier in this opinion, defendant voluntarily chose not to testify at trial.

In regard to defendant's assertion that OV 3 was incorrectly assessed at 5 points, although there was conflicting testimony concerning the scratch and whether the complainant suffered an injury as a result of the assault, defendant would not be entitled to resentencing even if OV 3 was not assessed any points. Defendant's total OV score was 25 (level II) and his PRV score was 40 (level D). OV 3 was scored at 5 points. If defendant's OV score decreased to 20, the score would still be within level II-D and his sentencing guideline range would not change. MCL 777.62. Accordingly, defendant would not be entitled to resentencing. *Francisco*, 474 Mich at 89 n 8.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering