STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON EARL WARNER,

Defendant-Appellant.

FOR PUBLICATION
October 7, 2021
9:00 a.m.

No. 351791
Eaton Circuit Court
LC No. 2016-020296-FC

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

CAMERON, P.J.

Defendant, Damon Earl Warner, appeals his jury-trial conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*i*). Defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to 20 to 40 years' imprisonment. We affirm.

I. BACKGROUND

Defendant was convicted of CSC-I for assaulting his 13-year-old stepdaughter. According to the victim, defendant first assaulted her sometime in 2011 while she was sitting on her bed. She testified that defendant "pulled down [her] pants and tried sticking his penis into [her] vagina." The victim was unable to remember certain details, but she was clear that defendant did not penetrate her vagina with his penis during this assault. A few months later, the victim alleged that defendant assaulted her again, this time in the dining room. During this assault, defendant approached the victim from behind and put his hand in her pants. Defendant digitally penetrated the victim when his hand went "up into [her] vagina."

In December 2015, the victim told her mother that defendant had sexually assaulted her. The disclosure occurred during an argument, and the victim's mother did not believe the victim. The victim's mother called the victim's father and told him to come pick up the victim. When the victim's father arrived, the victim and her mother were standing outside. The victim was upset and did not want to go with her father. At some point, defendant came outside and threatened the victim, informing her that he was going to slit her throat. The victim eventually left with her father and, from that point forward, the victim lived with her father full time.

Three days later, the victim told her father and her stepmother that defendant had sexually assaulted her. However, law enforcement was not notified until early January 2016, after the victim reported the assaults to her guidance counselor at school. Detective James Maltby was assigned to the investigation and arranged for defendant to be interviewed by Detective Sergeant Derrick Jordan. During that interview, defendant admitted to penetrating the victim's vagina with four of his fingers. Defendant explained that he did so at the urging of the victim and only after she placed his hand in her pants while they were "wrestling around[.]" Defendant was not arrested at that time. Several days later, Detective Maltby interviewed defendant.

In August 2016, defendant was arrested and charged with CSC-I and second-degree criminal sexual conduct (CSC-II), MCL 750.520c, for his alleged conduct in the bedroom and the dining room. In defendant's first jury trial, he was convicted of CSC-II. The jury was unable to reach a verdict as to the charge of CSC-I. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 10 to 30 years' imprisonment for CSC-II. After sentencing, the prosecutor decided not to retry defendant for CSC-I; therefore, the prosecutor moved to dismiss, or *nolle prosequi*, the CSC-I charge. On August 14, 2017, the trial court granted the prosecutor's motion and dismissed the CSC-I offense without prejudice.

Several years later this Court granted defendant a new trial after he successfully appealed his CSC-II conviction. *People v Warner*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket No. 340272), p 6.[1] We therefore remanded the CSC-II charge back to the trial court to schedule a new trial. *Id*.

After defendant's new trial date was scheduled, the prosecutor moved the trial court to amend the information to reinstate the CSC-I charge that had been dismissed. The prosecutor explained that she had only sought dismissal of the CSC-I charge "based on the sentence imposed by [the trial court]" and "in consultation with the victim."[2] The trial court granted the motion to amend the information and the CSC-I charge was reinstated over defendant's objections.

The parties also addressed several pretrial issues relevant to this appeal. The prosecutor provided notice that she had retained Thomas Cottrell, an expert in the dynamics of child sexual abuse, to "explain delayed report[ing] of child sexual abuse victims, the process of child sexual abuse disclosure, and perpetrator grooming behavior." The prosecutor provided defendant a summary of Cottrell's expected testimony. Defendant moved the trial court to appoint him an expert concerning false confessions and to conduct an *in camera* inspection of the victim's medical and psychological records. The trial court denied both of defendant's motions.

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[1] This Court granted defendant a new trial on the ground that defendant was denied the effective assistance of counsel because counsel failed to request a specific unanimity instruction. *Warner*, unpub op at 4, 6.

[2] Defendant agrees on appeal that the prosecutor sought to dismiss the CSC-I charge because the victim was satisfied with a prison sentence of "at least ten years in prison" for CSC-II and because the prosecutor did not want to "put [the victim] through a second trial."

Defended fared worse at his second jury trial. Specifically, he was convicted of CSC-I and acquitted of CSC-II. The guidelines minimum sentence range for defendant's CSC-I conviction was 51 to 127 months' imprisonment. The trial court departed from the advisory sentencing guideline range and sentenced defendant to 20 to 40 years' imprisonment. This appeal followed.

II. REINSTATEMENT OF THE CSC-I CHARGE

Defendant first argues that the trial court erred by granting the prosecutor's motion to reinstate the CSC-I charge that had been dismissed after his first trial. Defendant argues that after an offense is dismissed at the prosecutor's request, that offense can only be reinstated by the prosecutor filing a new indictment in district court. Because the prosecutor did not follow this procedure, defendant asserts that he is entitled to another new trial. We disagree. The trial court properly granted the prosecutor's motion to amend the information.

"The interpretation of either a statute or a court rule is a question of law subject to review de novo. A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003) (citations omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

In this case, defendant's first jury convicted him of CSC-II. After defendant was sentenced to prison for CSC-II, the prosecutor moved to dismiss the CSC-I charge that was still pending and the trial court entered the prosecutor's proposed *nolle prosequi* order of dismissal. Thereafter, this Court reversed defendant's CSC-II conviction and remanded the CSC-II charge for a new trial. *Warner*, unpub op at 6. Before trial, the prosecutor moved the trial court to amend the information to include the charge of CSC-I pursuant to MCR 6.112(H). The trial court granted the motion over defendant's objection, concluding that the court could properly amend the information and reinstate the CSC-I count.

Defendant does not directly address the prosecution's argument that the amendment to the information was proper under MCR 6.112(H). Instead, defendant relies on MCL 767.29 and related case law to support his argument that after a *nolle prosequi* is sought and entered, the dismissed charge can only be reinstated through a new indictment in district court, not by amendment. MCL 767.29 provides, in relevant part:

> A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes. . . .

Defendant's argument relies heavily on *People v Curtis*, 389 Mich 698, 703-706; 209 NW2d 243 (1973), in which our Supreme Court considered the language of a prior version of MCL

767.29[3] and indicated that a prosecuting attorney who secures a *nolle prosequi* after an indictment must "obtain a new indictment and begin proceedings anew if [the prosecutor] wish[es] to reinstate the original charge." The *Curtis* Court further stated that, under the statute, a prosecutor is not permitted "to retract a Nolle prosequi and immediately proceed to trial on the same indictment." *Id*. at 706. This procedure was later recognized by this Court in *People v Ostafin*, 112 Mich App 712, 716; 317 NW2d 235 (1982), in which we held that "the prosecution must begin proceedings anew after entry of an order of nolle prosequi, and may not merely seek to reinstate a previous indictment or conviction." The holding in *Ostafin* was based on *Curtis*. *Id*.

In this case, the prosecutor did not begin the proceedings anew by filing a new indictment in district court. Instead, the prosecutor successfully moved to amend the information in circuit court under MCR 6.112(H). MCR 6.112(H) provides that "[t]he court before, during, or after trial may permit the prosecutor to amend the information . . . unless the proposed amendment would unfairly surprise or prejudice the defendant." Importantly, under MCR 6.112(H), an information can be amended to charge a new crime. *McGee*, 258 Mich App at 689-690.[4] Therefore, the question presented is which procedure must be followed when a prosecutor decides to reinstate a charge that was dismissed without prejudice pursuant to an order of *nolle prosequi*.

"Under our Constitution, the Supreme Court's rule-making power in matters of court practice and procedure is superior to that of the Legislature." *People v Parrott*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 350380); slip op at 9, lv pending (quotation marks and citation omitted). Our Supreme Court's authority to determine rules of practice and procedure in the courts of this state is evidenced by MCR 6.001(E), which provides:

> The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter.

We conclude that the language of MCL 767.29 and MCR 6.112(H) do not conflict. Indeed, the language of MCL 767.29 merely requires that before a *nolle prosequi* is authorized, a prosecutor must state his or her "reasons for the discontinuance or abandonment" of an indictment on the record and obtain permission for the dismissal from the court that has jurisdiction to try the offense charged. But the statute does not speak to the procedure that is required when a prosecutor wishes to reinstate a charge that was voluntarily dismissed without prejudice. Nevertheless, as noted by defendant, in *Curtis*, 389 Mich at 703-706, our Supreme Court considered the language of a similar statute that preceded the current version of MCL 767.29 and stated that the "statute has the effect of requiring a prosecuting attorney who entered a Nolle prosequi after indictment to

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[3] Although MCL 767.29 was amended by 1988 PA 90 after *Curtis* was decided, the statute was not materially changed by the amendment.

[4] We acknowledge that, in *People v Higuera*, 244 Mich App 429, 446; 625 NW2d 444 (2001), this Court held that "[a]n information may be amended . . . so long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." However, in so holding, the *Higuera* Court cited MCL 767.76. *Id*. Importantly, MCL 767.76 is superseded by MCR 6.112(H). *McGee*, 258 Mich App at 689.

obtain a new indictment and begin proceedings anew if [the prosecutor] wished to reinstate the original charge." In order to understand this statement, it is necessary to take a closer look at *Curtis*.

In *Curtis*, 389 Mich at 701, the defendant was charged with sale of marijuana. As part of a plea bargain reached in district court, the prosecutor "moved to amend the original complaint by adding a second count charging [the] defendant with unlawful possession." *Id*. The prosecutor then moved to *nolle prosequi* the more serious sale of marijuana charge. *Id*. The district court granted both motions; therefore, only the possession charge was bound over to circuit court. *Id*. at 701-702. But after bindover, the circuit court judge expressed doubt about whether the district court judge had authority to dismiss a felony charge. *Id*. at 702. Later, the circuit court sua sponte "issued an order of superintending control to the District Court requiring that an examination be held by that court as to the charge of sale [of marijuana]." *Id*. Importantly, the circuit court also concluded that the order of *nolle prosequi* entered by the district court judge was "null and void" because circuit courts alone have authority to enter a *nolle prosequi* for felonies. *Id*.

Ultimately, our Supreme Court granted leave in *Curtis* to answer the question "whether or not a District Court judge may grant an order of Nolle prosequi of any felony charge before [the judge], upon motion of the prosecuting attorney, or whether that discretion is reserved to Circuit Court." *Curtis*, 389 Mich at 703. After concluding that neither the text of MCL 767.29 nor the parties' arguments "answer the question presented," the Court determined that it was proper to review the "history of the statute and the term 'nolle prosequi' itself . . . for an understanding of what the People of this State attempted to accomplish by first enacting this statute in 1846." *Id*. at 703-704. After considering the common law that was in place before MCL 767.29's "forerunner" was enacted in 1846, *id*. at 705-706, our Supreme Court stated:

> A . . . review of the common law reveals that the Nolle prosequi at that time could be retracted at any time, and must have become a Matter of record to prevent a revival of proceedings on the original indictment. It thus appears clear to the court that the forerunner of the present statute in question was enacted to protect the interests of the criminal defendant. This it did by requiring that thereafter all Nolle prosequi would be entered on the record. This statute then had the effect of requiring a prosecuting attorney who entered a Nolle prosequi after indictment to obtain a new indictment and begin proceedings anew if he wished to reinstate the original charge. It thus effectively overruled the old common law rules permitting a prosecutor to retract a Nolle prosequi and immediately proceed to trial on the same indictment. . . . Today, as long as jeopardy has not attached, or the State of Limitations not run, our law permits a prosecutor to reinstate the original charge on the basis of obtaining a new indictment and thus beginning the process anew.
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> It does not appear, therefore, that the Legislature in any way attempted to restrict the use of Nolle prosequi in those circumstances where the prosecutor could not, solely at his discretion, reinstate the case for immediate trial. In situations akin to the one before us, this could not be done in any event as no indictment nor information had yet been filed with the trial court. The defendant still retained the right to a grand jury proceeding or a preliminary examination.

> We thus hold that [MCL 767.29] applies only to proceedings held in Circuit Court after the indictment or information is filed with that court. [*Id*. at 706-707.]

Based on this analysis, our Supreme Court concluded that MCL 767.29 did not establish that only circuit courts have authority to dismiss felony charges. *Id*. at 707. The *Curtis* Court then continued with its analysis, ultimately holding that the district court had authority to dismiss the felony charge. *Id*. at 707-711.

While the *Curtis* Court did indicate that proceedings must begin anew after a *nolle prosequi* is entered, we conclude that the statement is dicta. "[O]biter dictum" is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001) (second alteration in original; quotation marks and citation omitted).

The issue before the *Curtis* Court was whether the district court had authority to dismiss a felony charge by way of an order of *nolle prosequi*. *Curtis*, 389 Mich at 703. In the Court's analysis of whether MCL 767.29 resolved that issue, the Court considered why MCL 767.29's predecessor statute was enacted and then opined about the effects of the statute's enactment. *Id*. at 704-706. The issue before the *Curtis* Court was not whether the prosecutor could reinstate a felony charge in circuit court after entry of the *nolle prosequi*. Indeed, there is no indication that the prosecutor in *Curtis* even wanted to pursue the charge that it had moved to dismiss as part of a plea agreement; rather, it was the circuit court judge who sua sponte concluded the *nolle prosequi* was null and void. *Id*. at 702. Therefore, the Court's statements concerning the effect of former MCL 767.29 was commentary that was offered to explain that the statute did not restrict a district court's authority to enter a felony *nolle prosequi* order of dismissal. Respectfully, contrary to the conclusion reached by the concurrence, the question of what procedure a prosecutor must comply with to reinstate a charge that was dismissed via a *nolle prosequi* was not germane to the controversy at issue in *Curtis*, but rather the central issue was whether the discretion to grant or deny a motion for *nolle prosequi* was reserved solely to a circuit court. See *Higuera*, 244 Mich App at 437.

Additionally, the language of the opinion supports that the *Curtis* Court was well aware that its comment did not originate from the plain text of the statute that existed at the time that *Curtis* was decided. Indeed, the Court merely opined that the *effect* of that statute was to require prosecutors to start proceedings anew after successfully moving for an order of *nolle prosequi*. *Curtis*, 389 Mich at 706. While the *Curtis* Court offered this comment, there is no indication that the *Curtis* Court read words into the plain language of the statute, which is prohibited. See *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 411; 809 NW2d 609 (2011). Thus, the statements in *Curtis* are not precedential or persuasive. See *Higuera*, 244 Mich App at 437.

Although in *Ostafin*, 112 Mich App at 716, this Court held that "the prosecution must begin proceedings anew after entry of an order of *nolle prosequi*, and may not merely seek to reinstate a previous indictment or conviction," *Ostafin* is not binding on this Court, *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019). More importantly, we conclude that *Ostafin* is also unpersuasive because its holding relies entirely on the dicta expressed in *Curtis*.

The concurrence notes that, in *People v Richmond*, 486 Mich 29; 782 NW2d 187 (2010), our Supreme Court cited *Curtis* in what appears to be a favorable manner. However, the *Richmond* Court did not specifically address whether MCL 767.29 actually applied to the facts of that case and did not engage in any sort of in depth analysis of that statute or of *Curtis*'s interpretation of it. Indeed, the *Richmond* Court concluded that it was unnecessary to address whether MCL 767.29 applied because "that dispute" did not affect the analysis of the issue that was before the Court, i.e., whether the prosecutor's actions rendered the issue of whether the trial court improperly suppressed certain evidence moot. *Richmond*, 486 Mich at 33 n 1, 34. The *Richmond* Court merely commented that the prosecutor had the option of beginning the proceedings anew. *Id*. at 36 n 3. See also *People v Richmond (On Rehearing)*, 486 Mich 1041, 1041; 783 NW2d 703 (2010) amended 784 NW2d 204 (2010).

At no point did the Courts in *Curtis*, *Ostafin*, or *Richmond* address the interplay between MCL 767.29 and MCR 6.112(H). Indeed, there is no indication that MCR 6.112(H) or a similar rule existed at the time *Curtis* and *Ostafin* were decided. It is also difficult to fathom how a discussion of MCR 6.112(H) would have been relevant in *Ostafin* or *Richmond*. In both cases, the prosecutors successfully moved to dismiss the charges that were pending before the trial courts. *Ostafin*, 112 Mich App at 715; *Richmond*, 486 Mich at 33. In this case, however, all charges were not dismissed. Indeed, the CSC-II charge was still pending before the trial court when the prosecutor moved to reinstate the CSC-I charge. Neither the parties nor this Court have found any authority that would permit amendment of an information under MCR 6.112(H) after all charges have been dismissed and the trial court is divested of jurisdiction.

Having decided that *Curtis*, *Ostafin*, and *Richardson* are not controlling and having concluded that MCL 767.29 does not describe the proper procedure for reinstating a charge that was previously dismissed pursuant to a *nolle prosequi*, we turn to the court rule applied by the trial court when it amended the information and reinstated the CSC-I charge and consider whether, under that rule, the amendment unfairly surprised or prejudiced defendant. See MCR 6.112(H). Because the amendment did not result in unfair surprise or prejudice to defendant, we conclude that the trial court properly amended the information under MCR 6.112(H) to reinstate the CSC-I charge.

Understandably, defendant does not assert on appeal that the amendment resulted in unfair surprise. Such a claim would be difficult to make in this case. When defendant was charged in 2016, he was notified at his arraignment that he was charged with CSC-I. During his preliminary examination and at his first trial, defendant successfully defended himself against allegations that he digitally penetrated the victim in the dining room. There is no dispute that the reinstated CSC-I charge was for the same CSC-I allegations that defendant had previously defended himself against. Therefore, the amendment reinstating the same CSC-I allegation in 2019 could not have surprised, let alone unfairly surprised, defendant. Defendant's argument on appeal is that the prosecutor used the wrong procedure to reinstate the CSC-I count, not that reprosecution for that offense was unfair or prohibited.

Defendant's argument in support for a procedure that requires reindictment also fails to explain what he would have gained had the CSC-I charge been refiled in district court. Nor does he explain how the amendment reinstating the CSC-I charge in circuit court resulted in unfair prejudice under MCR 6.112(H). But defendant's preference for reindictment was explained to the

trial court. Specifically, defendant explained that reindictment for CSC-I was preferable because this procedure would entitle him to another preliminary examination at which he could call new witnesses. When the trial court pressed defendant to explain, he asserted that there were two new witnesses: the victim's then-husband[5] who would testify that the victim "gave him a different version of events," and one of the victim's brothers, who would testify that the victim lied during a forensic interview.

The trial court was not persuaded that these new witnesses entitled defendant to a second preliminary examination. The trial court concluded that these witnesses would not "in any way, affect or result in any different outcome as to the preliminary examination" because "they would be impeachment witnesses." We agree with the trial court's assessment.[6] While district courts "must consider . . . the credibility of the witnesses," a "district court cannot discharge a defendant if the evidence conflicts or raises reasonable doubt concerning a defendant's guilt because this presents an issue for the trier of fact." *People v Redden*, 290 Mich App 65, 84; 799 NW2d 184 (2010). Thus, even if the new witnesses' testimony conflicted with that of the victim at a preliminary examination, the testimony would not have prevented the district court from binding that matter over because matters of credibility would ultimately be an issue for the jury. See *id*. Furthermore, although the trial court offered to arraign defendant on the CSC-I charge, defendant waived formal arraignment for that count.

Because defendant did not establish unfair surprise or prejudice, the trial court did not abuse its discretion by permitting amendment of the information under MCR 6.112(H). See *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998) (holding that, "[w]here a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of . . . a sufficient opportunity to defend at trial").

We caution that our conclusion that the trial court properly amended the information under MCR 6.112(H) is based on our very specific set of facts—none of which were present in *Curtis*, *Ostafin*, or *Richmond*. Under different circumstances, such as those at issue in *Richmond* and *Ostafin*, we may have concluded that the prosecutor in this case was required to begin the proceedings anew. Additionally, while it is arguable that the prosecutor could have filed a motion to set aside the order granting the prosecutor's request for *nolle prosequi*, the prosecutor in this case did not move the trial court for relief from the August 14, 2017 order under MCR 2.612(C). Because a motion for relief from the August 14, 2017 order was not before the trial court, we pass no judgment as to whether it would have been appropriate for the trial court to grant such a motion.

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[5] The victim and her husband were in the process of divorcing during the time leading up to the second trial.

[6] We further note that defendant did not call the victim's then-husband at the second trial. Defendant did call the victim's oldest brother, who was present when the victim's father retrieved the victim from her mother's home in December 2015. The victim's oldest brother testified that he did not recall defendant threatening to slit the victim's throat or having to restrain defendant.

III. DUE PROCESS

Defendant argues that his due process right to present a defense was violated by the trial court improperly denying his motion for appointment of an expert on false confessions and by the trial court's refusal to conduct an *in camera* inspection of the victim's medical and psychological records.

A. STANDARDS OF REVIEW AND RELEVANT AUTHORITY

"This Court reviews de novo whether [a] defendant suffered a deprivation of his constitutional right to present a defense." *People v Propp*, 330 Mich App 151, 166; 946 NW2d 786 (2019), lv gtd 506 Mich 939; 949 NW2d 459 (2020). We review a trial court's decision on whether to appoint an expert for an indigent defendant for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). "A trial court's decision to conduct or deny an in camera review of records in a criminal prosecution is [also] reviewed for an abuse of discretion." *People v Davis-Christian*, 316 Mich App 204, 207; 891 NW2d 250 (2016).

As this Court noted in *Parrott*, ___ Mich App at ___; slip op at 4,

> "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (quotation marks and citation omitted). Specifically, "[a] criminal defendant must be provided a meaningful opportunity to present evidence in his or her own defense." *People v Bosca*, 310 Mich App 1, 47; 871 NW2d 307 (2015). However, a defendant's right to present a complete defense "is not unlimited and is subject to reasonable restrictions." *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). A defendant's "right to present a complete defense may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. (quotation marks and citation omitted).

B. ANALYSIS

1. MOTION FOR APPOINTMENT OF AN EXPERT WITNESS

Defendant argues that the trial court violated his right to due process by improperly denying his motion to appoint a false-confession expert.[7] We disagree.

Our Supreme Court has recognized that "[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense[.]" *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012) (quotation marks and citation omitted). In *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985), the United States Supreme Court outlined the

[7] Defendant also argues that his right to equal protection was violated. However, because he fails to explain or rationalize this argument or provide any supporting authority, the argument is abandoned. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

framework for determining when an indigent defendant is entitled to the appointment of an expert. The *Ake* Court stated:

> Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. [*Id.*]

In *People v Kennedy*, 502 Mich 206, 210; 917 NW2d 355 (2018), our Supreme Court held that the United States Supreme Court's decision in *Ake* "is the controlling law" on matters involving an indigent criminal defendant's request for "expert assistance[.]" The *Kennedy* Court adopted the "reasonable probability" standard set forth in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), to help a trial court determine whether a defendant established that he or she was entitled to expert assistance under *Ake*. *Kennedy*, 502 Mich at 226-228. The *Kennedy* Court indicated that, in order to be entitled to funds, a defendant is required to "demonstrate something more than a mere possibility of assistance from a requested expert[.]" *Id*. at 227 (quotation marks and citation omitted). "Rather . . . a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id*. (quotation marks and citation omitted). "In addition, the defendant should inform the court why the particular expert is necessary." *Id*. (quotation marks and citation omitted). The *Kennedy* Court further indicated that a "defendant's bare assertion that an expert would be beneficial cannot, without more, entitle him or her to an expert[.]" *Id*. at 226 (citation omitted).

In this case, defendant moved the trial court to appoint a false-confession expert. After oral argument, the trial court denied defendant's motion based on a conclusion that such evidence would be inadmissible under *Kowalski*. The trial court also explained that, under *Kowalski*, "it was proper to exclude literature of false confessions."

Defendant argues that the trial court improperly denied his motion based on a misinterpretation of *Kowalski*, and we agree given that *Kowalski* did not create a categorical ban on false-confession testimony and literature. Rather, in *Kowalski*, the trial court held a *Daubert*[8] hearing to determine whether the proposed experts' testimony would be admissible under MRE 702. *Kowalski*, 492 Mich at 112. The trial court ultimately excluded the proposed experts' testimony. *Id*. at 115-117. On appeal, our Supreme Court considered whether the trial court properly excluded the proposed testimony, ultimately affirming in part and reversing in part. *Id*. at 118-119, 144. Thus, because *Kowalski* concerned whether a trial court properly applied the rules of evidence following a *Daubert* hearing and did not hold as a matter of law that false-confession testimony is universally inadmissible, the trial court in this case erred by concluding that expert testimony regarding false confessions was not permitted under *Kowalski*.

[8] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Nonetheless, we conclude that the trial court did not abuse its discretion by denying the motion because defendant did not show that a reasonable probability existed "that denial of expert assistance would result in a fundamentally unfair trial." See *Kennedy*, 502 Mich at 227. While defendant sought expert testimony to support his defense, defendant did not argue that he would be unable to present a false-confession defense without an expert witness. Indeed, defendant indicated that the proposed false-confession experts "would speak not to the fact that the defendant made a false confession but instead would speak to the attributes associated with false confessions and the interviewer bias of Det. Derrick Jordan." At the motion hearing, defense counsel indicated that proposed expert Dr. Brian Cutler would not testify "to the ultimate issue of whether there was a false confession" but would instead testify "to the psychology of whether the attributes of a false confession are present."

Additionally, although defendant argued in the trial court that denying him an expert would be fundamentally unfair because the prosecutor had retained Cottrell, Cottrell was not retained to testify about the reliability of defendant's confession. Rather, Cottrell was retained to explain delayed reporting by child victims and the "grooming" rituals in which sexual predators often engage. The prosecutor's notice of Cottrell's proposed testimony specifically indicated that Cottrell would not testify regarding the veracity of the victim's claims or whether defendant was guilty. We fail to see how the prosecutor's retention of Cottrell to present generalized testimony about a different issue demonstrates that the denial of a false-confession expert resulted in a fundamentally unfair trial for defendant. In sum, the trial court did not abuse its discretion by denying defendant's motion. See *People v Lyons*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998) ("This Court will affirm a lower court's ruling when the court reaches the right result, albeit for the wrong reason.").[9]

Even without expert testimony, defendant was able to present evidence and argument that his confession was false. Defense counsel explained during his opening statement that defendant had been interviewed three times by law enforcement and suggested that defendant's statement to Detective Sergeant Jordan was not a real confession. Defense counsel also told the jury that they should put themselves "in [defendant's] position in these interviews" and "to very carefully listen to the officer's behavior and questions and how he acts."[10]

Detective Sergeant Jordan testified on direct examination that he had utilized certain "strategies," which included blaming the victim, during the interrogation. Detective Sergeant Jordan noted that he had done so in order to get defendant to "open up." Detective Sergeant Jordan acknowledged that he did not know whether certain statements that he made to defendant were accurate. A portion of Detective Sergeant Jordan's interview with defendant was played at trial, and defendant's statement that was written by Detective Sergeant Jordan was admitted into evidence. Defense counsel cross-examined Detective Sergeant Jordan about the techniques that he used during the interview, and Detective Sergeant Jordan testified that he had interviewed defendant for a "[c]ouple of hours" and that defendant had confessed to penetrating the victim's

[9] Given this holding, we need not address defendant's argument that a hearing is required to determine whether he was indigent at the time of the motion hearing.

[10] It appears that the "the officer" defense counsel was referencing was Detective Sergeant Jordan.

vagina "closer to the end" of the interview. Defense counsel also asked Detective Sergeant Jordan about his level of education, as compared to defendant's level of education. During cross-examination of Detective Maltby, who had watched defendant's interview with Detective Sergeant Jordan from a different room, defense counsel elicited favorable testimony that Detective Sergeant Jordan was more aggressive than defendant during the interview.

Defense counsel argued during his closing that defendant's statement to police was coerced. Defense counsel pointed out that Detective Sergeant Jordan testified that *he* wrote the statement that defendant had signed. Defense counsel argued as follows: "Detective Jordan gave [defendant] the story that he wanted to hear. And you know why? Because the police had already interviewed [the victim] and got a version of what she said. So, this was a script." Defense counsel further argued that defendant would have been arrested immediately had the police believed that the confession was valid. Consequently, even though the trial court denied defendant's motion for appointment of an expert, defendant was not deprived of a meaningful opportunity to present a false-confession defense.

2. MOTION FOR *IN CAMERA* REVIEW OF THE VICTIM'S RECORDS

Defendant argues that he was denied his due process right to present a defense because the trial court improperly denied his motion for *in camera* review of the victim's confidential records. We disagree.

"The right to present a defense . . . protects a defendant's ability to put before a jury evidence that might influence the determination of guilt and to have access to exculpatory evidence." *Propp*, 330 Mich App at 167 (quotation marks and citation omitted). "Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense. Nonetheless, defendants generally have no right to discover privileged records absent certain special procedures, such as an in camera review of the privileged information conducted by the trial court." *Davis-Christian*, 316 Mich App at 207-208.

In *People v Stanaway*, 446 Mich 643, 649; 521 NW2d 557 (1994), our Supreme Court balanced the opposing interests of protecting the confidentiality of privileged records with a criminal defendant's right to obtain evidence necessary to his defense. The *Stanaway* Court held that "where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an *in camera* review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id*. at 649-650. The Court held, however, that a defendant's "generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id*. at 650.

Defendant does not dispute that the victim's records contain privileged information. Thus, defendant was only entitled to have the trial court conduct an *in camera* review of the victim's records if he could "establish a reasonable probability that the privileged records [were] likely to contain material information necessary to his defense." *Stanaway*, 446 Mich at 649. Defendant did not do so. In defendant's motion, he alleged that review of the victim's records was necessary because (1) the victim was going through certain family issues, including a divorce; (2) evidence

supported that the victim had "trouble with consequential thinking," anxiety, depression, "ADHD and trouble concentrating"; (3) the victim's younger half-brother has a genetic issue, which the victim may also have; and (4) the victim and members of her family engage in dysfunctional behavior. For these reasons, defendant argued that the victim "may have emotional issues that need to be explored to test" her credibility. At oral argument on the motion, defendant added that the victim was receiving mental health treatment before she made the allegations and that she had been in trouble at school.

The trial court properly concluded that defendant merely offered generalized assertions that the record might contain useful evidence, as opposed to offering "any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense." See *Stanaway*, 446 Mich at 681. At most, defendant's arguments merely supported that the victim's records *may* reveal evidence to support defendant's theory that the victim had fabricated the allegations against him. Because defendant's "request falls short of the specific justification necessary to overcome the privilege" and essentially amounted to an attempt to "fish" for evidence that may enhance his defense, the trial court did not abuse its discretion by denying defendant's motion. See *id*. at 681-682.

We further note that the victim's medical records were not necessary for defendant's defense that the victim had fabricated the allegations against him. During opening statements, defense counsel implored the jury to "listen to inconsistencies and contradictions in [the victim's] story." Defense counsel emphasized at trial that the victim's mother did not believe that the victim was being truthful about the assaults and that other members of the victim's family did not report the assaults after the victim disclosed them. During cross-examination of the victim, defense counsel successfully impeached the victim and elicited testimony that she could not recall certain details regarding the assaults. Defense counsel also elicited testimony from the victim's stepmother that, at the time of the 2016 investigation, she had questioned the victim's mental stability. Testimony was elicited from the victim's older half-brother that he had not spent much time with the victim in the past few years because of a "loss of respect for her character." Defense counsel also elicited favorable testimony from the prosecution's expert, Cottrell, that he had heard of false reports, that he had never met the victim, and that the testimony that he offered concerning the dynamics of sexual abuse may not apply in this case.

During closing arguments, defense counsel argued that the victim was not credible because she had provided inconsistent statements concerning the alleged assaults and because her behavior following the alleged assaults was not consistent with someone who had been assaulted. Defense counsel also pointed out that the victim's family did not believe her and suggested that law enforcement did not believe the victim considering that the victim was interviewed twice by police and given that defendant was not immediately arrested even though he had allegedly "confessed" to police. Defendant's acquittal of CSC-II suggests that defendant's defense of undermining the victim's credibility had some success. Therefore, defendant was not denied the right to present a meaningful defense as a result of the trial court's decision to deny his motion for *in camera* review of the victim's privileged records.

IV. SENTENCING

A. REASONABLENESS OF SENTENCE

Defendant argues that his 20 to 40 year sentence for CSC-I was unreasonable. We disagree.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). The standard of review is abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). A trial court abuses its discretion when it applies a minimum sentence that violates the principle of proportionality or "by failing to provide adequate reasons for the extent of the departure sentence imposed[.]" *Id*. at 476.

"[A] sentence is reasonable under *Lockridge* if it adheres to the principle of proportionality set forth in [*People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990)]." *People v Lampe*, 327 Mich App 104, 126; 933 NW2d 314 (2019) (alteration in original; quotation marks and citation omitted). Factors that a trial court may consider under the proportionality standard include the following:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*Id*. (quotation marks and citation omitted).]

In this case, defendant was convicted of CSC-I and his guidelines minimum sentence range was 51 to 127 months' imprisonment. During sentencing, the trial court identified a number of factors it considered when sentencing defendant. The trial court first noted the severe impact the sentencing offense had on the victim's life, stating that the assault destroyed the victim's life and the girl "she would have been." The court also expressed deep concern that a grown man would sexually assault a child and then try to justify his criminal sexual misconduct to police by providing extensive detail about how the victim was sexually aroused by him—something the trial court described as "absolutely disgusting." The trial court further stated that throughout the proceeding, defendant "blamed the victim" and had a "nonchalant" demeanor that "was very striking throughout the trial." And perhaps most importantly, the trial court noted that while the guidelines already considered defendant's prior felony convictions, the guidelines did not account for how similar defendant's prior CSC-III conviction was to the sentencing offense such that both defendant's prior conviction and the sentencing offense involved the sexual assault of an adolescent girl. The trial court explained that defendant's predilection to prey on vulnerable children reflects that defendant is unlikely to be reformed and underscores the need for the trial court's sentence to protect society.

Rather than address each of these proper sentencing considerations, defendant argues that the trial court's sentence improperly punished him for blaming the victim at trial. Defendant argues that this was improper because maintaining one's innocence in a criminal sexual conduct case necessarily requires a defendant to accuse a victim of lying. While "[a] sentencing court may

not base a sentence, even in part, on a defendant's failure to admit guilt," a court may consider a defendant's lack of remorse. *People v Carlson*, 332 Mich App 663, 675; 958 NW2d 278 (2020).

> To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, we focus on three factors: (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. [*Id*. (quotation marks and citation omitted).]

In this case, the trial court noted at sentencing that defendant continued to maintain his innocence. But there is no indication that the trial court improperly attempted to force defendant to admit his guilt or improperly punish defendant for doing so. To the contrary, the trial court noted that a defendant has an "absolute right" to maintain innocence, but "without revictimizing the victim." The trial court's statements at sentencing do not suggest that defendant was punished for maintaining his innocence or claiming that the victim was lying. Rather, the trial court's statements reflect that it considered defendant's statement to police that his criminal conduct was somehow justified or excused because the victim was the sexual aggressor. The trial court properly considered defendant's unscripted statement to police because defendant's justification for his conduct suggested to the trial court that defendant has low potential for rehabilitation and an unreasonable risk of reoffending.

Defendant next argues that there was no reasonable explanation for his sentence, which exceeded the guidelines minimum sentence range. However, this argument is not supported by the record, which establishes that the trial court provided a detailed and well-reasoned explanation as to why it concluded that a 20-year minimum sentence was "proportionate to the seriousness of the circumstances surrounding the offense and the offender." See *Steanhouse*, 500 Mich at 474. Consequently, the trial court did not abuse its discretion.

B. VINDICTIVE SENTENCING

Defendant next argues that the trial court's minimum sentence of 20 years for his CSC-I conviction was an unlawful vindictive sentence because the sentence punished him for successfully exercising his right to appeal. We disagree.

A claim that a sentence is vindictive implicates a defendant's constitutional rights. *Michigan v Payne*, 412 US 47, 50; 93 S Ct 1966; 36 L Ed 2d 736 (1973). "This Court reviews de novo a question of constitutional law." See *Kennedy*, 502 Mich at 213.

In *North Carolina v Pearce*, 395 US 711, 723-724; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part on other grounds by *Alabama v Smith*, 490 US 794; 109 S Ct 2201; 104 L Ed 2d 865 (1989), the United States Supreme Court recognized that a sentence that punishes a defendant for successfully appealing a conviction is vindictive and therefore violates a defendant's due process rights. The *Pearce* Court held that such vindictive considerations "must play no part in the sentence [a defendant] receives after a new trial." *Pearce*, 395 US at 725. The Court further held that, "[i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must

affirmatively appear." *Id*. at 726. "[T]he factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id*. The standard established in *Pearce* was broad and far-reaching.

But the United States Supreme Court has since clarified that "[t]he *Pearce* requirements . . . do not apply in every case where a convicted defendant receives a higher sentence on retrial." *Texas v McCullough*, 475 US 134, 138; 106 S Ct 976; 89 L Ed 2d 104 (1986). This is because "the evil the [*Pearce*] Court sought to prevent" was not the imposition of "enlarged sentences after a new trial," but the "vindictiveness of a sentencing judge." *Id*. The Court has further recognized that because "the severity" of applying an inflexible presumption "may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982), the Supreme Court has "limited its application . . . to circumstances where its objectives are thought most efficaciously served," *Smith*, 490 US at 799 (quotation marks and citations omitted). "Such circumstances are those in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id*. at 799, quoting *Goodwin*, 457 US at 373. But where the possibility of judicial vindictiveness is only speculative, a presumption of vindictiveness does not apply and "the burden remains upon the defendant to prove actual vindictiveness[.]" *Smith*, 490 US at 799 (quotation marks and citations omitted). Thus, the once broad presumption of vindictiveness established in *Pearce* is now limited to circumstances where there is a reasonable likelihood that a sentence improperly punishes a defendant for exercising the right to appeal a conviction, while the mere speculation of vindictiveness will not invoke the *Pearce* presumption.

Appellate courts have declined to apply the *Pearce* presumption of vindictiveness where the reasons for the harsher sentence after a successful appeal are apparent from the surrounding circumstances. For example, the United States Supreme Court has rejected the argument that the *Pearce* presumption applies whenever a defendant's sentence is increased following retrial, regardless of whether the sentence was imposed by the same "sentencer." See *Colten v Kentucky*, 407 US 104, 116-118; 92 S Ct 1953; 32 L Ed 2d 584 (1972) (declining to apply the presumption when the second court in a two-tier trial system imposed a longer sentence); *Chaffin v Stynchcombe*, 412 US 17, 26-27; 93 S Ct 1977; 36 L Ed 2d 714 (1973) (declining to apply the presumption where a jury imposed the increased sentence on retrial). In such circumstances, there is no reason to assume that the second sentencer held a grudge against the defendant and was motivated by actual vindictiveness. Similarly, judicial vindictiveness is unlikely to have occurred when a defendant receives a higher sentence after proceeding to trial following a previous guilty plea being vacated on appeal. *Smith*, 490 US at 794, 801. This is the case because "[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after trial." *Id*. at 801. The United States Supreme Court also declined to apply the presumption of vindictiveness in a case where the trial court granted the defendant's motion for a new trial on the basis of prosecutorial misconduct. *McCullough*, 475 US at 138-139. The Court concluded that, in such a case, there is "no realistic motive for vindictive sentencing[.]" *Id*. at 139.

Our Supreme Court has recognized that, when the same judge resentences a defendant and increases the sentence, the increased sentence is presumptively vindictive. See *People v Mazzie*,

429 Mich 29, 35; 413 NW2d 1 (1987); *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997) (the defendant was resentenced for a longer period of time by the same judge, therefore the presumption is raised). And like the federal courts, Michigan appellate courts have not invoked a presumption of vindictiveness when the reason for the imposition of a greater sentence is apparent. *Mazzie*, 429 Mich at 33 ("where a second sentence is imposed by a judge other than the judge who imposed the original sentence, we should not invoke a presumption of vindictiveness").

In this case, we conclude that the *Pearce* presumption of vindictiveness does not apply. We recognize that the same trial judge presided over both trials and imposed a harsher sentence after defendant successfully appealed. But under *Pearce* and its progeny, this is only the first step of the analysis. Before the *Pearce* presumption can be invoked, an appellate court must examine the surrounding circumstances to determine whether there is a reasonable likelihood that the defendant was punished for successfully appealing his conviction. The facts here do not support invoking the presumption.

First, defendant was convicted of CSC-I after his second trial, whereas defendant's first trial resulted in a conviction for CSC-II, an offense punishable by up to 15 years' imprisonment. MCL 750.520c(2)(a). After defendant's successful appeal, he was convicted of CSC-I, an offense punishable by "imprisonment for life or for any term of years." MCL 750.520b(2)(a). Under Michigan's guideline scheme, CSC-I is categorized as crime class "A" which is reserved for the most serious felony offenses, while the guidelines categorize CSC-II in crime class "C," thereby designating it a less serious offense. MCL 777.16y. Because of this, defendant's CSC-I conviction was scored in a higher sentencing grid, resulting in a higher minimum prison sentence for CSC-I.[11] Accordingly, defendant's sentence was different because the guidelines minimum sentence range was increased, as was the maximum potential sentence. These circumstances, not judicial vindictiveness, support the trial court's imposition of a more severe sentence that better accounts for the severity of the sentencing offense. Indeed, the trial court's sentence was a "legitimate response to criminal conduct." See *Goodwin*, 457 US at 373.

Because the possibility of judicial vindictiveness is only speculative and the presumption does not apply, "the burden remains upon . . . defendant to prove actual vindictiveness[.]" See *Smith*, 490 US at 799. The record contains no indication of actual vindictiveness on the part of the trial court. Indeed, the record is absent of any expressed hostility that suggests that the trial court deliberately penalized defendant for successfully exercising his right to appeal his previous conviction and sentence. Because defendant has failed to make a showing of actual vindictiveness, he is not entitled to the relief he seeks.

Furthermore, even if we were to conclude that the presumption of vindictiveness applied, the presumption would be overcome. The presumption of vindictiveness is rebutted when "events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities arise." *Pearce*, 395 US at 723 (quotation marks and

[11] The minimum guidelines sentence range with respect to the CSC-II conviction was 12 to 36 months' imprisonment. The minimum guidelines sentence range with respect to the CSC-I conviction was 51 to 127 months' imprisonment.

citation omitted). Similarly, "the presumption may be overcome where the judge at resentencing possessed information which was unavailable to [the judge] at the initial sentencing, even where that information does not concern conduct of the defendant occurring *after* the first trial." *Mazzie*, 429 Mich at 35-36. "[T]he presumption of vindictiveness may be overcome only when the extent of the increase in the sentence bears a reasonable relationship to the new information." *Id*. at 36.

As explained by the trial court, CSC-I is a particularly serious offense. The court stated:

> [I]n this case, a jury of [defendant's] peers found him guilty of CSC first, and I agree with the comments by [the prosecutor]. Murder is always the crime that we think of as the absolute worst thing. And, I guess, in almost every way it is because the person is gone. But, in a case of CSC first, with a 13 year old girl, [the victim's] gone too. At least the girl she would have been but for the intervening acts of the Defendant that the jury found were, in fact, committed.

Although defendant appears to argue that the conduct underlying the CSC-I charge was not new information because the trial court could have considered the conduct underlying the CSC-I charge at his original sentencing for CSC-II, there is no indication that the trial court did so. Although the trial court did reference the conduct underlying the CSC-I charge, it stated:

> [Defendant] didn't have to blame the victim. He didn't have to accuse a 13 year old of allegedly grabbing his hand and putting it down his pants. The jury didn't believe him, I don't believe him, and it's really a revictimization. By saying those things he is revictimizing this young girl.[12]

Thus, the trial court merely indicated that it found defendant's *statements* about that offense to be relevant. The trial court did not state that it was sentencing defendant on the basis of the conduct underlying the CSC-I charge. We conclude that it is irrelevant that the trial court *could* have considered the conduct underlying the CSC-I charge when there is no indication that the trial court actually did so in relation to the 2017 sentencing.

Additionally, defendant's updated presentencing investigation report (PSIR) indicates that PPOs were obtained on behalf of the minor children that defendant shared with the victim's mother. The trial court noted that it was concerning that the PPOs were obtained *after* defendant's parental rights were terminated to those children. At defendant's 2017 sentencing, there was no mention of PPOs, although defendant's counsel at the time indicated that defendant's parental rights had been terminated. In addition, the victim was not present at the 2017 sentencing hearing. Rather, the victim's aunt spoke on the victim's behalf, and the victim's statement was included in the original PSIR. The victim's statements at the 2019 sentencing hearing included new information. Specifically, at defendant's 2019 sentencing, the victim reported that defendant had damaged many of her relationships with family members, including her relationships with her mother and older brother. In the victim's 2017 statement, she merely asked for the "maximum

[12] Defendant testified at the first trial that he did not touch the victim inappropriately and that he had lied to law enforcement. Defendant did not testify at the second trial.

sentence possible," but at the 2019 sentencing she specifically asked the trial court to sentence defendant to 20 to 40 years' imprisonment.

Additionally, we conclude that the increase of a 10-year minimum to a 20-year minimum bore a reasonable relationship to the new information, which was unavailable at defendant's original sentencing. See *Mazzie*, 429 Mich at 36. Indeed, the trial court did not rely on minor information that had no relevance to a fair or appropriate sentence. See *id*. Instead, the trial court appropriately relied on the seriousness of a CSC-I offense, the impact that defendant's crime had on the victim's life, and defendant's behavior following the termination of his parental rights, which is relevant to defendant's "habits, conduct, and mental and moral propensities." See *Pearce*, 395 US at 723 (quotation marks and citation omitted). In sum, the trial court provided an appropriate on-the-record, wholly logical, nonvindictive reason for the sentence. See *id*. at 726.

Affirmed.

/s/ Thomas C. Cameron
/s/ James Robert Redford

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON EARL WARNER,

Defendant-Appellant.

FOR PUBLICATION
October 7, 2021

No. 351791
Eaton Circuit Court
LC No. 2016-020296-FC

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

BORRELLO, J (*concurring in result*).

I concur in the result reached by the majority but write separately to express my strong disagreement with the majority's attempt to overturn law set forth by a superior court under the guise of labeling a holding by our Supreme Court "dicta." Here, the majority seeks to cast aside prior holdings by our Supreme Court and this Court which held that following entry of an order of *nolle prosequi*, the prosecution was required to begin the proceedings anew. In their opinion, the majority concludes that it was proper for the trial court to allow the prosecution to reinstate the CSC-I charge against defendant by amending the information and without remanding to the district court for a new preliminary examination. The majority arrives at their result by erroneously concluding that the procedure to be undertaken in such cases as previously set forth in *People v Curtis*, 389 Mich 698; 209 NW2d 243 (1973) was meaningless dicta. It is here where I take issue with my colleagues. It is no small detail for an inferior court to begin labeling the holdings of a superior court dicta, especially in cases, where, like here, the superior court has reaffirmed the very holding now labeled dicta by an inferior court. As will be pointed out below, our Supreme reaffirmed their holding in *Curtis* in 2010. Following their affirmance, this Court published a case based on that very "dicta." Unfortunately, because the majority's precepts of what constitutes "dicta" are erroneous, the entirety of their analysis on this issue is rife with error. Unlike the majority, I do not believe we need to conjure an opinion from a blank slate, nor do I see a legal or policy basis to casually dismantle a half century of legal precedent set forth by a superior court. Therefore, contrary to the analysis employed by the majority, I conclude, that binding precedent from our Supreme Court dictates that the procedure employed here by the trial court was erroneous. Nonetheless, I further conclude that the error was harmless and would affirm the result on that basis.

Our Supreme Court held in *Curtis*, 389 Mich at 706 that the forerunner to MCL 767.29[1] "was enacted to protect the interests of the criminal defendant" and "effectively overruled the old common law rules permitting a prosecutor to retract a Nolle prosequi and immediately proceed to trial on the same indictment." The *Curtis* Court further held that "[t]his statute then had the effect of requiring a prosecuting attorney who entered a Nolle prosequi after indictment to obtain a new indictment and begin proceedings anew if he wished to reinstate the original charge." *Curtis*, 389 Mich at 706.

In this case, the trial court permitted the prosecution to avoid following this procedure by allowing the prosecution to amend the information to reinstate the CSC-I charge that had previously been dismissed by a *nolle prosequi* order. Under *Curtis*, the prosecution should have been required "to obtain a new indictment and begin proceedings anew" in order to reinstate the original CSC-I charge. *Curtis*, 389 Mich at 706. The failure to follow this procedure was error. *Id*.

The majority avoids this result by concluding that the rule quoted above from *Curtis*, requiring a prosecutor to "begin proceedings anew" in order to reinstate a charge that had been dismissed by *nolle prosequi* after indictment, was dicta. They are wrong. "[O]biter dictum" is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001) (second alteration in original; quotation marks and citation omitted). However, this Court has also recognized that "[t]he Michigan Supreme Court has declared . . . that [w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Id*. (quotation marks and citation omitted; second alteration in original).

In *Curtis*, the Court's pronouncement of the rule requiring prosecutors to begin anew when reinstating a charge that had been dismissed by *nolle prosequi* was made in the context of the Court's analysis of the history of MCL 767.29 and the common law applicable to *nolle prosequi* before that statutory provision was enacted. *Curtis*, 389 Mich at 704-706. The Court was required to construe MCL 767.29 because the "appellee, and the Honorable Circuit Court Judge, by means of his order of superintending control, [took] the position that the matter is determined by MCLA 767.29; MSA 28.969 . . . ." *Curtis*, 389 Mich at 703.

The *Curtis* Court explained that in order to answer the question presented—i.e. "whether or not a District Court judge may grant an order of Nolle prosequi of any felony charge before him, upon motion of the prosecuting attorney, or whether that discretion is reserved to Circuit Court"—a "review of the history of the statute involved and the term 'nolle prosequi' itself is necessary for an understanding of what the People of this State attempted to accomplish by first enacting this statute in 1846." *Curtis*, 389 Mich at 703-704. In the context of this analysis, the

[1] The *Curtis* Court noted that this statute had "remained virtually unchanged since its first adoption in 1846." *Curtis*, 389 Mich at 704.

Court determined that the statute changed the prior existing common law regarding *nolle prosequi*[2] by requiring all *nolle prosequi* to be entered on the record and further requiring prosecutors to "obtain a new indictment and begin proceedings anew" before reinstating any charge that had been previously dismissed by an order of *nolle prosequi* after indictment. *Id*. at 706. After making this determination, the *Curtis* Court further concluded:

> It does not appear, therefore, that the Legislature in any way attempted to restrict the use of Nolle prosequi in those circumstances where the prosecutor could not, solely at his discretion, reinstate the case for immediate trial. In situations akin to the one before us, this could not be done in any event as no indictment nor information had yet been filed with the trial court. The defendant still retained the right to a grand jury proceeding or a preliminary examination.
>
> We thus hold that MCLA 767.29; MSA 28.969 applies only to proceedings held in Circuit Court after the indictment or information is filed with that court. [*Id*. at 706-707.]

Our Supreme Court in *Curtis* proceeded to analyze other sub-issues before ultimately holding that "the Circuit Court, in this situation, committed error in issuing its order of superintending control requiring that an examination be held on the higher charge. As to that count, the prosecuting attorney had already entered a Nolle prosequi, with leave of the district court. We now state that such an action was within the discretion of the District Court judge." *Id*. at 710-711.

It is thus clear from the Supreme Court's opinion in *Curtis* that the issue of how a prosecutor was to reinstate a charge that had been previously dismissed by a *nolle prosequi* order was intentionally taken up and decided by the Court, and it is also clear from the opinion that this issue was necessary to the decision or, at a minimum, germane to the controversy. Contrary to the view taken by the majority, our Supreme Court in *Curtis* expressed in no uncertain terms that this issue was necessary and germane to its analysis. Accordingly, the rule that a prosecutor in this situation must "begin proceedings anew" is not dicta but is instead a binding decision by a superior court. *Higuera*, 244 Mich App at 437. This conclusion is further bolstered by the fact that our Supreme Court has cited *Curtis* for this same rule. See *People v Richmond*, 486 Mich 29, 36 n 3; 782 NW2d 187 (2010) ("If the prosecution's voluntary dismissal was a *nolle prosequi* under MCL 767.29, the prosecution could have reinstated the 'original charge on the basis of obtaining a new indictment . . . .' *People v Curtis*, 389 Mich. 698, 706, 209 N.W.2d 243 (1973).") (ellipsis in original).

The majority does not stop at its pronouncement that our Supreme Court's rule announced in *Curtis* was dicta; they go further by criticizing the soundness of our Supreme Court's decision

[2] The *Curtis* Court summarized the common law applicable to *nolle prosequi* as it existed prior to the enactment of the statutory provision at issue as follows: "A further review of the common law reveals that the Nolle prosequi at that time could be retracted at any time, and must have become a Matter of record to prevent a revival of proceedings on the original indictment." *Curtis*, 389 Mich at 705-706.

in *Curtis*, characterizing our Supreme Court's construction of the statute as a comment that is not precedential or persuasive because (although the majority attempts to deny that this is their reason) the Supreme Court effectively read additional language into the statute. However, our Supreme Court has been abundantly clear in stating that "[i]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 192-193; 880 NW2d 765 (2016) (quotation marks and citation omitted).

Additionally, the majority relies on MCR 6.112(H), which provides that the "court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant." However, this court rule is silent regarding the procedure when the prosecution seeks to reinstate a charge that has previously been dismissed by an order of *nolle prosequi* such as occurred in the instant case. Thus, the circumstances at issue in this case are squarely controlled by our Supreme Court's holding in *Curtis* and the court rule is inapplicable.

Having concluded that the procedure followed in this case was erroneous does not, however, end the analysis. The practical effect of this error was to deny defendant a new preliminary examination before the CSC-I charge was reinstated. As this Court concluded in *People v McGee*, 258 Mich App 683, 685; 672 NW2d 191 (2003), "in light of defendant's subsequent conviction, any error in failing to conduct a preliminary examination does not warrant reversal because defendant has not shown that the alleged error affected the trial." The same is true in this case. Defendant was subsequently convicted of CSC-I following his jury trial. Thus, the failure to conduct a preliminary examination as a result of the improper procedure followed for reinstating the CSC-I charge was harmless. *Id*. For that reason, I would conclude that reversal is not required on this ground.

/s/ Stephen L. Borrello