

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN LOWELL BAILEY,

Defendant-Appellant.

UNPUBLISHED

October 14, 2021

No. 347548

Grand Traverse Circuit Court

LC No. 13-011601-FC

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

On remand from our Supreme Court,¹ defendant appeals as on leave granted the trial court’s denial of his motion for relief from judgment. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of defendant’s jury trial convictions of one count of first-degree criminal sexual conduct (CSC-I) under MCL 750.520b(2)(b) (sexual penetration of a person less than 13 years of age by a person 17 years of age or older), two counts of CSC-I under MCL 750.520b(1)(a) (sexual penetration of a person who is less than 13 years of age), and one count of CSC-I under MCL 750.520b(1)(b)(ii) (sexual penetration of a person older than 13 years of age, but younger than 16 years of age, and who is related by blood or affinity). In defendant’s claim of appeal as of right, *People v Bailey*, 310 Mich App 703; 873 NW2d 855 (2015), this Court delineated the following basic facts, his convictions, and sentences:

Defendant was charged with engaging in digital-vaginal sexual penetration of three minors: MB, AB, and BS. Defendant, who was born in 1982, was BS’s uncle and MB and AB’s great-uncle. He was charged with four counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1), and convicted of each

¹ *People v Bailey*, 506 Mich 945 (2020).

following a jury trial. We affirm defendant's convictions against his arguments that they were not supported by sufficient evidence, that his due process rights were violated, that the trial court made erroneous evidentiary rulings, and that the trial was tainted by prosecutorial misconduct. However, we remand for resentencing.

AB and MB were sisters, and defendant resided in their home for several years. MB, born in 1996, testified that defendant repeatedly engaged in digital-vaginal penetration of her as far back as she could remember, but that her first specific recollection of defendant digitally penetrating her occurred when she was seven years old. She testified that defendant continued this conduct until he moved out of the home in November 2008. As to MB, defendant was charged with, and convicted of, two counts of CSC-I. In Count I, but not Count II, defendant was charged with violating MCL 750.520b(1)(a) and (2)(b) (victim under the age of 13 and defendant 17 years of age or older), the provision that provides for a 25-year mandatory minimum term of imprisonment, MCL 750.520b(2)(b). The jury was instructed that to convict on this offense, it had to find that defendant committed the crime between August 1, 2008, and November 2008 (the month in which MB testified that the assaults stopped). Count II did not provide for any specific date of offense other than a nearly seven-year period and was a charge simply under MCL 750.520b(1)(a) (victim under age 13).

AB, born in 1994, testified that the first incident of digital-vaginal penetration occurred in the summer of 2003 and continued on a daily basis until she left for boarding school in the summer of 2008. As to AB, defendant was charged with, and convicted of, a single count of CSC-I, MCL 750.520b(1)(a) (victim under the age of 13). The date of the offense was listed as January 1, 2001, to November 30, 2008, with no particular date referenced. This was Count III of the felony information.

BS, born in 1994, was a first cousin once removed of AB and MB. She testified that defendant digitally penetrated her vagina on one occasion in June 2007, during a visit. As to BS, defendant was charged with, and convicted of, a single count of CSC-I, MCL 750.520b(1)(b)(ii) (victim at least 13 years of age but less than 16 and related to defendant by blood or affinity to the fourth degree). This was Count IV of the information.

Defendant was convicted on all counts. As to Count I, the trial court sentenced him to 25 to 50 years' imprisonment. For each of the other counts, the court imposed terms of 225 months to 50 years. The trial court, stating that it was exercising its authority under MCL 750.520b(3), ordered that the sentence for Count I be served consecutively to the other three sentences, which were to be served concurrently with one another. In sum, defendant was sentenced to a combined minimum term of 43 years and 8 months, which will make him 79 years old at the time he is first eligible to be considered for parole. [*Id.* at 709-711.]

This Court rejected defendant's challenge to the sufficiency of the evidence premised on a lack of corroborating forensic evidence and an attack on the credibility of the witnesses. *Id.* at 713-715.

We also rejected his argument that he was deprived of due process in light of the prosecutor's extended time frame for the claimed abuse, the joinder of the charges, and the failure to instruct the jury regarding unanimity. *Id.* at 715-718. His claims of evidentiary error for admission of other-acts evidence and seven different instances of prosecutorial misconduct were also denied. *Id.* at 720-722. Defendant's claim that his trial counsel was ineffective as it related to the joinder of charges, admission of other-acts evidence, and jury unanimity instruction was denied because he could not show that the outcome of the trial would have been different. *Id.* at 727-728. However, a majority of this Court concluded that the trial court did not have the discretion to impose consecutive sentences, and therefore, vacated his sentence on Count I and remanded for resentencing. *Id.* at 723-726. Defendant's application for leave to appeal was denied. *People v Bailey*, 498 Mich 896 (2015).

In the trial court, defendant moved for relief from judgment, MCR 6.500 *et seq.* Specifically, defendant claimed that relief from judgment was warranted for: (1) actual innocence; (2) fabricated charges and witness perjury (sufficiency); (3) prosecutorial misconduct by admission of other-acts evidence and a violation of the sequestration order; (4) judicial misconduct by allowing the admission of "other crimes evidence" and allowing the witnesses to remain in the courtroom; (5) jurisdictional defect by allowing AB to testify regarding out-of-county sexual abuse; (6) ineffective assistance by trial counsel for waiving the preliminary examination, failing to impeach, and failing to call witnesses; and (7) ineffective assistance by appellate counsel. With the motion, defendant submitted affidavits from his father and others to contradict the plausibility of the victims' testimony regarding the location and timing of the sexual abuse.

The trial court issued a written opinion without hearing oral argument and ruled that defendant made "the same, or substantially equivalent arguments, on a number of issues that were decided on appeal." Specifically, because this Court addressed the sufficiency of the evidence and the victims' credibility pertaining to defendant's claim of innocence and the issue of ineffective assistance of trial counsel, the trial court concluded it was precluded from addressing those issues. To the extent that defendant raised "new" issues of judicial and prosecutorial misconduct, the trial court determined that defendant failed to demonstrate good cause for failing to raise those issues in the claim of appeal as of right. The trial court concluded that there was no jurisdictional defect pertaining to AB's testimony of an incident of sexual abuse that occurred in another county. Because it was uncharged conduct, but properly admissible evidence, MRE 404(b), the challenge to jurisdiction failed. Finally, the trial court rejected defendant's claim of ineffective assistance by appellate counsel, concluding counsel raised the most relevant claims, was not required to raise frivolous or meritless claims, and a different result was not established, but for any alleged error by appellate counsel. Therefore, the trial court denied the motion for relief from judgment because defendant did not establish that he was entitled to relief. Defendant filed two motions for reconsideration, and the trial court denied both motions, concluding that defendant failed to demonstrate palpable error.

II. APPLICABLE STANDARDS

This Court reviews for an abuse of discretion a trial court's decision on a motion for relief from judgment. *People v Walker*, 328 Mich App 429, 436; 938 NW2d 31 (2019). The trial court abuses its discretion when it makes an error of law or when its decision falls outside the range of reasonable and principled outcomes. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399

(2013). The trial court’s factual findings made in support of its relief from judgment decision are reviewed for clear error. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). This Court reviews de novo the trial court’s interpretation of court rules. *Id.*

“Motions for relief from judgment are governed by MCR 6.500 *et seq.*” *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018). “A defendant in a criminal case may move for relief from a judgment of conviction and sentence. MCR 6.502(A).” *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010). “A defendant has the burden to establish entitlement to relief. MCR 6.508(D).” *Swain*, 288 Mich App at 630. When a defendant seeks such relief on grounds, other than jurisdictional defects, that could have been raised on appeal, the defendant must show “good cause” for the failure to raise such grounds earlier and “actual prejudice” as a result of the alleged irregularity. MCR 6.508(D)(3)(a) and (b). Additionally, this Court “may not grant relief to the defendant if the motion . . . alleges grounds for relief which were decided against defendant in a prior appeal or proceeding . . . unless the defendant establishes that a retroactive change in the law has undermined the prior decision[.]” MCR 6.508(D)(2).

III. ANALYSIS

A. SUFFICIENCY AND CREDIBILITY

Defendant first alleges that the trial court erred in denying his challenge to the sufficiency of the evidence because a police report demonstrated that the victims fabricated the claims of abuse and conspired against him because he ended his relationship with AB and MB’s mother. We disagree.

Defendant is not entitled to relief from judgment because this ground for relief was raised and rejected in the prior appeal. MCR 6.508(D)(2). Moreover, defendant relies on statements made by the victims as reported by others. However, defendant failed to demonstrate that the police reports contained contradictory statements and that the police reports were admissible; in fact, they generally contain inadmissible hearsay. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 247; 805 NW2d 217 (2011). Further, although defendant attached affidavits to his motion for relief from judgment opining that an incident of sexual abuse could not have occurred while the family attended a funeral, the attempt to create a dispute regarding location is not dispositive. First, the trier of fact has the right to disregard all, part, or none of the testimony of a witness. See *People v Goodchild*, 68 Mich App 226, 235; 242 NW2d 465 (1976). Thus, the jury could have found that the sexual abuse occurred even if the victims’ misidentified the location. Additionally, the information in the affidavits regarding location existed prior to trial, and defendant failed to demonstrate good cause for failing to raise such grounds on appeal. MCR 6.508(D)(3)(a). Further, the affidavits identify the location of the family funeral in Edmore, Michigan, a village in Montcalm County. Thus, defendant was not charged for this offense, and it was offered as other-acts evidence. See MRE 404(b). Accordingly, because a convicted offense did not arise from the sexual abuse in Montcalm County, any challenge to jurisdiction was without merit and not a ground for relief from judgment.

Moreover, defendant’s challenge to the credibility of the witnesses was thoroughly explored during trial and rejected by the jury and by this Court in his claim of appeal as of right. *Bailey*, 310 Mich App at 714. The victims did not raise the allegations of sexual abuse until years

after the events occurred. However, MB testified that seeing a young female seated on defendant's lap at her birthday party triggered her to send her father a private message about the sexual abuse. When the family discussed the extent of the abuse, AB revealed that she also was abused. BS subsequently confirmed that she was abused by defendant. Moreover, BS testified that she did not wish to make a police report about the single act of abuse because she had moved past the incident. Rather, she was prompted to submit to a police interview by the persistence of her mother. Indeed, AB and MB explained that they did not report the abuse earlier and were conflicted about any report. Specifically, they viewed defendant as more than a great-uncle, but rather, a father figure or older brother. It was difficult for them to separate the kind individual that defendant was to them from the abuser, and they knew that the report of abuse would destroy the family. Thus, the delay in reporting and the motive for the report was explored by both the prosecution and the defense, and the jury, as the trier of fact, nonetheless found the victims' testimony to be credible. Defendant cannot negate the jury's verdict and our rejection of the issue in his claim of appeal of right by raising the issue in a motion for relief from judgment.²

B. PROSECUTORIAL MISCONDUCT

Next, defendant contends that relief from judgment is warranted because the prosecution committed misconduct by failing to meet the notice requirements for other-acts evidence as required by MRE 404(b)(2) and MCL 768.27a, as well as violating a sequestration order by allowing witnesses to remain in the courtroom before they testified. We disagree.

As an initial matter, we note that the other-acts evidence issue was raised in defendant's claim of appeal as of right, and it was determined that defendant did not establish plain error affecting his substantial rights. *Bailey*, 310 Mich App at 720. Further, there was no retroactive change in the law pertaining to this issue, and defendant failed to identify the other-acts evidence to which he objects. Consequently, defendant is not entitled to relief from judgment because this ground for relief was raised and rejected in the prior appeal. MCR 6.508(D)(2).

² Defendant submits that the contradictions in the victims' trial testimony, the police reports, and the affidavits demonstrate that he is actually innocent. Effective May 1, 2020, MCR 6.508(D)(2) was amended to include that "a court is not precluded from considering previously decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously decided claims when considered together the new claim for relief, create a significant possibility of actual innocence[.]" The trial court denied the motion for relief from judgment on November 13, 2018, the first motion for reconsideration on December 7, 2018, and the second motion for reconsideration on January 7, 2019. Thus, the trial court's decisions pre-date this amendment. Nonetheless, the "actual innocence" standard is a demanding standard that allows for review in only extraordinary cases. *Swain*, 288 Mich App at 638. To satisfy the actual innocence standard, a defendant must demonstrate that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt. *Id.* (Citations and quotation omitted.) Even if we applied the actual innocence standard, this case is not extraordinary, but merely presented conflicts in the evidence. Defendant cannot satisfy this standard.

Although the trial court commenced the trial by instructing that the witnesses should be sequestered, the three victims were apparently present during the trial and not merely after their testimony. MCL 780.761 governs sequestration of a victim and provides:

The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies.

Further, the victim has the “right to attend trial and all other court proceedings the accused has the right to attend.” Mich Const 1963, art 1, § 24(1). “A defendant who complains on appeal that a witness violated the lower court’s sequestration order must demonstrate that prejudice has resulted.” *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

In the present case, defendant failed to demonstrate prejudice because of the victims’ presence in the courtroom throughout the trial. First, a victim is not necessarily barred from the courtroom, but rather, the court “may” order sequestration for good cause shown until the victim first testifies. MCL 780.761. The plain language of the statute does not render sequestration mandatory because it applies the permissive term “may” instead of the mandatory term “shall.” See *People v Seeburger*, 225 Mich App 385, 392-393; 571 NW2d 724 (1997). Moreover, if the issue had been raised by defendant, the trial court may have found that good cause existed because AB and MB’s parents were not present in the courtroom at their request. Specifically, the victims did not want their parents present when they testified regarding specific details of what happened to them. Thus, the victims, siblings and a cousin, may have remained in the courtroom to provide moral support. Although defendant contends that he was prejudiced by the victims’ presence in the courtroom in violation of the sequestration order because it allowed them to conform their testimony, that assertion is not substantiated by the record evidence. Specifically, BS testified regarding only one instance of digital penetration and to inappropriate pictures taken by defendant. MB, the youngest victim, testified that defendant started his abuse by kissing her on her lips, neck, and stomach, that the acts occurred both under and over her clothes, and the acts elevated to digital penetration. MB further averred that defendant would pick her up and have her lay across his body. However, AB testified that defendant committed acts of digital penetration. There is no indication that the victims altered or changed their testimony to conform to the testimony that preceded their own. This claim of error does not entitle defendant to relief from judgment.³ Additionally, defendant failed to demonstrate good cause for why he failed to include his arguments regarding the prosecution’s lack of notice or the victims lack of sequestration in his previous appeal. See MCR 6.508(D)(3)(a). Although defendant argued in the trial court that his

³ Defendant further contends that the trial court and prosecutor misrepresented that the witnesses were, in fact, sequestered at trial. However, the trial court ordered the sequestration, and there was no evidence of noncompliance expressed on the record. Indeed, it became apparent from the context of a question posed by defense counsel that the witnesses were seated behind him. Thus, there was no evidence of intentional misrepresentation by the trial court and the prosecutor.

appellate counsel was ineffective, defendant does not make any such argument in this appeal and, therefore, he cannot demonstrate “good cause.”

C. DENIAL OF RECONSIDERATION

Defendant next submits that the trial court erred by failing to grant his motions for reconsideration after being apprised of his innocence, his family’s affidavits, and the fact that the victims did, in fact, remain in the courtroom contrary to the sequestration order and the denial of the second motion demonstrated the trial court’s prejudice against him. We disagree.

This Court reviews a trial court’s ruling on a motion for reconsideration for an abuse of discretion. *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016). A motion for reconsideration which merely presents the same issues ruled upon by the court, expressly or by implication, need not be granted. *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005). Generally, the moving party must demonstrate a palpable error by which the court and the parties were misled. *Id.* However, the trial court retains the discretion to give a second chance to a motion that it previously denied. *Id.*

Regardless of the trial court’s mistake regarding any violation of the sequestration order, the trial court did not abuse its discretion by denying defendant’s motions for reconsideration. Defendant failed to demonstrate actual innocence and a challenge to the victims’ testimony regarding the location of the abuse was not dispositive. Further, the identification of an error was not dispositive because the violation of the sequestration order required a showing that defendant suffered prejudice as a result to obtain a remedy. *Solak*, 146 Mich App at 669. Contrary to defendant’s assertion, there was no evidence of prejudice as a result of the victims’ presence in the courtroom during the testimony of other witnesses. There was no indication that the victims conformed or altered their testimony. Further, defendant failed to show “good cause” for the failure to raise such grounds earlier and “actual prejudice” as a result of the alleged irregularity. MCR 6.508(D)(3)(a) and (b).

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant submits that the trial court erred in denying his motion for relief from judgment because his defense counsel was ineffective for waiving his preliminary examination, for not calling witnesses that he suggested, for not impeaching the victims during their testimonies, and for not objecting to the prosecution’s introduction of other-acts evidence. We disagree.

In his original appeal defendant asserted that his defense counsel was ineffective because he failed to request that his charges be tried separately, failed to object to the other-acts evidence introduced by the prosecution pursuant to MRE 404(b), failed to request an unanimity instruction, and failed to argue that defendant should be sentenced consecutively. This Court stated that “defendant has failed to show that the first three of these objections or requests would have been successful.” *Bailey*, 310 Mich App at 729. Defendant has failed to demonstrate good cause for the failure to include these additional arguments regarding defense counsel’s ineffective assistance in his original appeal. See MCR 6.508(D)(3)(a). Further, the challenge to the failure to object to the other acts evidence was decided against defendant in the prior appeal. MCR 6.508(D)(2); *Bailey*, 310 Mich App at 728-729. Although the requirement of “good cause” can be established

by proving ineffective assistance of counsel, *Swain*, 288 Mich App at 631, counsel may leave out weaker issues in order to focus on arguments that are more likely to prevail. See *People v Uphaus*, 278 Mich App 174, 186-187; 748 NW2d 899 (2008).⁴ Moreover, issues regarding waiver of the preliminary examination, the decision to call witnesses, and the degree of impeachment invoke questions of trial strategy.

Affirmed.

/s/ James Robert Redford

/s/ Kirsten Frank Kelly

/s/ Anica Letica

⁴ We need not address defendant's last issue that we erred in denying defendant's application for leave to appeal. Our Supreme Court's directive that we address defendant's appeal as on leave granted rendered this issue moot.