Order

Michigan Supreme Court
Lansing, Michigan

September 21, 2022

Bridget M. McCormack,
Chief Justice

163945

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163945
COA: 352309
Genesee CC: 19-044543-FC

MARK EDWARD LEE, SR.,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the November 18, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the judgment of the Court of Appeals concluding that no prejudice resulted from trial counsel's deficient performance in failing to object when the defendant's son impermissibly opined on the defendant's credibility, and we REMAND this case to that court for reconsideration of that ineffective assistance of counsel claim. Although the Court of Appeals cited the correct standard for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it failed to apply that standard. The defendant was not required to show that, but for counsel's deficient performance, there was insufficient evidence to sustain his convictions. Rather, prejudice is established where a defendant shows that "but for counsel's deficient performance, there is *a reasonable probability* that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012) (emphasis added). On remand, the Court of Appeals shall resolve the defendant's claim of ineffective assistance of counsel under this standard. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

t0914

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 21, 2022

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD LEE, SR.,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 352309
Genesee Circuit Court
LC No. 19-044543-FC

Before: SWARTZLE, P.J., and SAWYER and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right following his convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b). We affirm.

This case arises out of defendant's sexually assaulting his minor grandchild, LL, and his minor step-grandchild, SP. After disclosing the assaults to their parents, both victims went to a police station to report the assaults. Detective Marcus Wilson took the original reports and then submitted them to the Sex Crimes division.

At trial, Detective Wilson testified that LL told him that defendant would touch her, kiss her, put his tongue in her mouth, put his fingers in her vagina, and try to put his penis in her vagina even though it would not fit. Detective Wilson also stated that SP told him that defendant performed oral sex on her before she kicked him away.

LL testified and reiterated the same information that Detective Wilson had testified about. SP also testified, but was unable to verbally communicate the events on direct examination and so she wrote her testimony down in front of the jury, under oath. SP's written testimony stated:

> I was sleeping and I don't remember exactly but I remember sleeping and waking up to him on the computer. So when I woke up again, he was next to me on the couch and I thought I was dreaming but I was not and he pulled down my pants and underwear and touched me and I tried to kick him away but he wouldn't

> go away and he licked my private and then left me alone and then I made a bed on his bedroom floor and I went to sleep.

Mark Lee, Jr., defendant's son, the biological father to LL, and the stepfather to SP, testified that he first discovered LL watching pornography and that prompted him to ask why she was watching material that was inappropriate for her. He stated that LL then disclosed the assaults to him. After talking to LL about what had occurred, Mark Lee, Jr., confronted defendant and asked him if he had ever touched the victims. Defendant said "no," but Mark Lee, Jr., testified that he did not believe him.

On appeal, defendant first argues that the trial court erred by allowing SP to produce written testimony because it violated his Sixth Amendment right to confront her. Defendant did not preserve this issue for appeal because he did not object, at trial, to SP's testimony on the grounds that it violated his Sixth Amendment right to confrontation. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.") A violation of the Confrontation Clause is not a structural error, and "[w]e review unpreserved claims of nonstructural, constitutional error for plain error." *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks, alteration, and citations omitted).]

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010) (citation omitted). Furthermore, "[t]he right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008) (quotation marks and citations omitted). "The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988).

Defendant had the opportunity to cross-examine SP and he did effectively cross-examine SP regarding multiple issues. SP did not refuse to answer any of defendant's questions, and defendant was able to elicit testimony that he later relied on to attack the credibility of another witness. Moreover, SP testified under oath at trial, she was available for cross-examination,

defendant did cross-examine her, and the jury was allowed to observe her demeanor. See *Yost*, 278 Mich App at 370. The Confrontation Clause does not guarantee that defendant has the right to cross-examine a witness in whatever way, and to whatever extent, he may wish. See *Owens*, 484 US at 559. Therefore, defendant's argument regarding SP's testimony is without merit. There was not a clear or obvious error that occurred.

Next, defendant argues that the trial court abused its discretion when it allowed the inadmissible hearsay testimony of Detective Wilson regarding the specific statements he was told by the victims.

"We review preserved claims of evidentiary error for an abuse of discretion." *People v Bergman*, 312 Mich App 471, 482; 879 NW2d 278 (2015). "The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls outside the range of principled outcomes." *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). "[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation marks and citation omitted). "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Thorpe*, 504 Mich at 252.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible unless a specific exception applies. MRE 802. In his testimony, Detective Wilson repeated out-of-court statements that LL and SP made, regarding their disclosure of the sexual abuse that they suffered, when they filed the police report.

When Detective Wilson began to give his testimony regarding the victims' disclosures, defendant objected that his testimony was inadmissible hearsay. The prosecution responded, saying that Detective Wilson's testimony was not being offered for the truth of the matter asserted, but instead he was testifying about "police procedure" and what the victims said as connected to why he forwarded the report further. The trial court agreed that Detective Wilson's testimony was not being offered for the truth of the matter asserted and overruled defendant's objection.

"This Court has long held that even if an out-of-court statement is not offered for the truth of the matter asserted, the statement is not automatically admissible because the touchstone of admissibility is relevance." *People v Musser*, 494 Mich 337, 354; 835 NW2d 319 (2013) (quotation marks and citations omitted). Therefore, even if the prosecution's statement that Detective Wilson's testimony was not for the truth of the matter asserted, i.e. that LL and SP were sexually assaulted by defendant, and was instead offered to explain police procedure regarding why the report was forwarded to the Sex Crimes unit, then the purpose is insufficient to present the testimony to the jury if the evidence is not relevant under MRE 401.

"Determining whether a statement is relevant requires a trial court to carefully scrutinize whether the statement is both material—i.e., offered to help prove a proposition which is . . . a matter in issue—and probative—i.e., tends to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." *Id.* at 355. Under this analysis, if Detective Wilson's testimony about out-of-court statements is

offered to provide context to a fact that is not in issue, then it follows that the testimony is immaterial and not relevant. Similarly, if the purpose for the testimony does not provide context to a fact that is in issue, then it does not have probative value.

Additionally, even if a witness's out-of-court statement has some relevance to its proffered purpose, that does not necessarily mean that the statement may be presented to the jury. See *id*. "Specifically, under MRE 403, a trial court has a historic responsibility to always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced before admitting such evidence." *Id*. at 356-357 (quotation marks and citation omitted). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. (quotation marks and citation omitted).

When weighing the probative value of testimony against the prejudicial effect it may have, "a trial court should be particularly mindful that when a statement is not being offered for the truth of the matter asserted . . . there is a danger that the jury might have difficulty limiting its consideration of the material to [its] proper purpose." *Id*. at 357 (quotation marks and citation omitted; alteration in original). This Court has stated that this principle is especially important in cases involving child-victims of sexual assault. See *id.* ("Indeed, this Court has recognized that child-sexual-abuses cases present special considerations given the reliability problems created by children's suggestibility.") This Court has explained:

> Further, although in the context of trial testimony, this Court has condemned opinions related to the truthfulness of alleged child-sexual-abuse complainants even when the opinions are not directed at a specific complainant. This is because in cases hinging on credibility assessments, the risk goes beyond any direct reference to a specific complainant given that the jury is often looking to hang its hat on the testimony of witnesses it views as impartial. Likewise, an out-of-court statement made by an investigating officer may be given undue weight by the jury where the determination of a defendant's guilt or innocence hinges on who the jury determines is more credible—the complainant or the defendant. Thus, even if an interrogator's statements are not offered for the truth of the matter asserted, courts must be mindful of the problems inherent in presenting the statements to the jury, especially in child-sexual-abuse cases.
>
> * * *
>
> Limiting out-of-court statements that are not offered for the truth of the matter asserted to their proper scope is not a new concept in Michigan jurisprudence. Indeed, this Court has previously rejected the notion that a rote recitation that a statement is not offered for the truth of the matter asserted is sufficient to admit an out-of-court statement. For example, in *Wilkins*, a police officer was allowed to testify to the contents of an informant's tip on the basis that the testimony was merely providing a basis for the officer's subsequent action. This Court held that even if the testimony was relevant for a purpose other than the truth of the matter asserted, under MRE 105, the officer's testimony should have been restricted to simply provide that the police officer was responding to a tip, which

was sufficient to establish the reason the officer took subsequent action. [*Id*. at 357-358.]

Similarly, in this case, even if the purpose of Detective Wilson's testimony was to provide the reason why he forwarded the report to another department, his testimony should have been restricted to provide that he spoke with the victims and received a report that was pertinent to the Sex Crimes unit, which was sufficient to establish the reason why he took the subsequent action. Furthermore, Detective Wilson's testimony regarding the specific statements that were provided by the victims was more prejudicial than probative because the jury very well might have had difficulty limiting that testimony to the purpose of understanding why Detective Wilson forwarded the report.

However, defendant has not demonstrated that it is more probable than not that the alleged error was outcome-determinative after an examination of the entire case. See *Lukity*, 460 Mich at 495-496. Even though defendant argues that this case was a credibility contest in which both victims had issues with their testimonies, defendant ignores that both victims testified about the sexual abuse that they suffered at the hands of defendant. Specifically, LL was able to provide detailed testimony regarding the abuse, and defendant was able to cross-examine each victim to impeach their credibility. Furthermore, Detective Wilson's testimony did not vouch for the victims' testimonies or state that he believed the victims, rather his testimony demonstrated that the nature of the report necessitated that it be forwarded to the Sex Crimes unit. Therefore, the trial court did not commit error requiring reversal by admitting Detective Wilson's testimony.

Next, defendant argues that the trial court erred by allowing Mark Lee, Jr., to improperly vouch for the victims' credibility as well as provide his opinion regarding defendant's guilt. Defendant did not object to Mark Lee, Jr.'s testimony at trial and, therefore, he did not preserve this issue for appeal. We review unpreserved challenges for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. In *Carines*, our Supreme Court explained:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id*. at 763 (quotation marks, alteration, and citations omitted).]

MRE 701 governs opinion testimony that is provided by lay witnesses, and it states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Furthermore, "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

During Mark Lee, Jr.'s direct examination, the following interaction occurred:

> [*The Prosecution*]. Okay. Now, I want to talk about that, this is your own father that we're talking about. Are you in a—do you feel like you're in a very difficult place as you're sitting here today?
>
> [*Mark Lee, Jr.*]. Yeah.
>
> *Q*. Okay. Help us understand. We see the difficulty, help us understand what you're thinking or what you're feeling.
>
> *A*. I looked up to him my whole life. He was my support system through a lot, through my whole life, that was my father and even still I like love him, you know, and like I want to believe that what I believe happened didn't happen but I believe that happened because I know my daughters just as much as I know who he is and they aren't capable of even holding a lie like that. They can't—they can't even hold a lie at all, like where'd you get the candy from? I don't have any candy. Yeah, you do, it's right there, like it's clear, and they break instantly. Like how—how can they hold a lie this long?
>
> *Q*. Okay, so let me back you up to that moment again, I'm sorry, we did a little sidetrack, but back in the moment, you said [your wife] is kind of the one who's doing most of the talking and you're mediating. Is anyone telling her what to say?
>
> *A*. No—no, we're asking her questions. There's no im—implications, nothing.

Given the context of Mark Lee, Jr.'s testimony, it is not plain that an error occurred because it was ambiguous whether he was vouching for the victims' credibility. He might have been vouching for their credibility, by suggesting that they could not make these allegations against defendant if they were not true. Alternatively, he might have been expressing his disbelief in how they would be able to not tell anyone, for any extended period of time, that they were being sexually abused. As a lay witness, Mark Lee, Jr., was entitled to give his opinion of the victims that is rationally based on his perception of them. Mark Lee, Jr., stated that his interactions with the victims, as he raised them, led him to have disbelief that they would be able to lie that they were not being sexually assaulted for so long. Additionally, Mark Lee, Jr., did not state that they were telling the truth when they testified or that they were telling the truth in their disclosure. Therefore, it is not plain that the alleged error occurred during Mark Lee, Jr.'s testimony regarding the veracity of the victims' disclosures. Furthermore, defendant has not demonstrated that this

error affected his substantial rights inasmuch as he argues that any alleged error was impermissible when considering that the trial was a "credibility contest" because there were no additional witnesses to the abuse. Defendant did not demonstrate that he was prejudiced when considering the other evidence against him, namely the direct testimonies of the victims as well as the trial court's instructions that the jury is presumed to have followed and that are presumed to cure most errors. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009) (quotation marks and citation omitted). Specifically, the trial court instructed the jury that it was to decide which witnesses it believed, detailing numerous several factors for the jury to consider.

Even if the alleged error occurred, Mark Lee, Jr.'s testimony regarding the victims' ability to "hold a lie" was nonresponsive to the prosecution's question. Generally, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 427; 884 NW2d 297 (2015) (quotation marks and citation omitted). In this case, defendant has not argued, and the record facts do not demonstrate, that the prosecution was aware that Mark Lee, Jr., would provide this testimony. Therefore, this alleged error does not justify a reversal of defendant's convictions.

Second, defendant argued that Mark Lee, Jr., testified about the guilt of defendant when he said that he "knew at that moment [defendant] was lying." Specifically, Mark Lee, Jr., testified as follows:

> [*The Prosecution*]. Okay, so you go over to confront your dad, what do you say to him?
>
> [*Mark Lee, Jr.*]. When I went in, I asked him because he had somebody over along with my sister's children. I had to wait for my sister to show up because I—because I didn't want to put them in danger or anything because I don't know what I'm going to do. I don't know what I'm going to do and I go in, I said, I need to talk to you, like very serious, just like this, I need—I need to talk to you. We go into his room, I close the door behind us and I—I said I heard some very real stories from my daughters and I need to know, did you touch them, did you mess with them, you know, and his—his reply was, no, I did not.
>
> *Q*. Okay, you just used a very proper voice, did he use that kind of voice?
>
> *A*. It got—it got very monotoned, yeah.
>
> *Q*. Okay, and what did you notice, if anything, about the way his demeanor changed when you confront him with this?
>
> *A*. He was scared.
>
> *Q*. Okay, how do you know that?
>
> *A*. That's what I saw. I've known him—I've known him my whole life, I've seen him lie, I've seen him get caught in lies, I've seen him—I've seen him do

> a lot of things and I knew at that moment he was lying. I knew at that moment he was scared that I would react.

As the prosecution admitted, Mark Lee, Jr.'s testimony does relate to the guilt of defendant, and to the credibility of his defense, even though it was permissible for Mark Lee, Jr., to testify to his perception of defendant's demeanor during their exchange. Mark Lee, Jr.'s testimony amounts to a clear error because he stated that defendant was lying when defendant said that he did not abuse the victims. However, defendant has not demonstrated that his substantial rights were affected by plain error that was outcome-determinative. Even though defendant argues that he was prejudiced by Mark Lee, Jr.'s testimony regarding their interaction, defendant has not shown that the testimony affected the trial court proceedings when considering the other evidence submitted, namely the direct testimonies of the victims and the trial court's instructions that the jury was responsible for determining the witnesses' credibility. See *Chapo*, 283 Mich App at 370..

Additionally, Mark Lee, Jr.'s testimony regarding his perception that defendant was lying to him during their interaction was nonresponsive to the prosecution's question. Generally, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *Id*. In this case, defendant has not argued, and the record facts do not demonstrate, that the prosecution was aware that Mark Lee, Jr., would provide this testimony. Therefore, this alleged error does not justify a reversal of defendant's convictions.

Lastly, defendant argues that his trial counsel was ineffective. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

To establish that defense counsel was ineffective, defendant must demonstrate that "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012); see also *Strickland v Washington*, 466 US 668, 689-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "[A] court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. (quotation marks and citation omitted). A defendant may meet the burden of showing that a different result would have been reasonably probable, but for defense counsel's error, "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 US at 694. "Where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of

prejudice will be less than where there is greater evidence of guilt." *Trakhtenberg*, 493 Mich at 56 (quotation marks and citations omitted).

"Defense counsel must be afforded broad discretion in the handling of cases." *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Trial counsel is not ineffective for failing to raise an objection or file a motion that lacks merit. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011). "Declining to raise objections can often be consistent with sound trial strategy." *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

Defendant challenges that his trial counsel was ineffective by not objecting to SP's written testimony for a violation of the Confrontation Clause, not objecting to Mark Lee, Jr.'s testimony, and not introducing expert testimony to argue that the victims had been improperly interviewed.

However, the record does not support defendant's claim that defense counsel provided ineffective assistance regarding SP's testimony. Because SP's written testimony was admissible and did not violate the Confrontation Clause, defense counsel's performance did not fall below an objective standard of reasonableness by failing to raise a futile objection. See *Fonville*, 291 Mich App at 384.

Similarly, the record does not support defendant's claim that defense counsel provided ineffective assistance regarding Mark Lee, Jr.'s testimony about the victims' disclosures, and their inability to hold in a lie, because that testimony was admissible. Defense counsel's performance did not fall below an objective standard of reasonableness by failing to raise a futile objection. See *id*.

Defense counsel did perform deficiently, however, when he did not object to Mark Lee, Jr.'s testimony that his opinion was that defendant was lying. It falls below an objective standard of reasonableness to not object to a witness who claims that defendant lied when denying the abuse. However, defendant has failed to demonstrate that a reasonable probability existed that, but for defense counsel's failure to object to Mark Lee, Jr.'s testimony, the results of the proceedings would have been different. LL testified that defendant kissed her, digitally penetrated her vagina, attempted to penetrate her vagina with his penis, performed oral-vaginal sex on her, and forced her to perform oral-penile sex on him. SP testified that defendant performed oral-vaginal sex on her before she kicked him off her. Given these testimonies, reasonable jurors could find beyond a reasonable doubt that defendant committed four counts of CSC-I and two counts of CSC-II. Moreover, absent Mark Lee, Jr.'s testimony, ample evidence supports the jury's verdict. See *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

The record reflects that defense counsel had contemplated providing an expert at trial. Specifically, on the first day of trial, before jury selection, the trial court asked defense counsel the following:

> [*Trial Court*]: Okay. So, I know that the last time we were here there was a request for a new attorney, that request was denied on the record. There were arguments made, the motion was submitted, and, again, on the eve of trial that was not something that I believed was appropriate considering it was—I believe it's an impediment to justice at this point in time in proceeding with a trial. So, is there

any—I know that there's been some discussion about, you know, whether or not the matter should be adjourned for a specific witness or a proposed expert witness but I've never heard a specific expert witness identified so I don't know if there's anything that you need to place on the record at this time, [Defense Counsel]?

[*Defense Counsel*]: No, Judge.

And then the following interaction occurred after the prosecution had rested its case:

[*Trial Court*]: Okay, so we'll need to take a look at those and discuss those further.

So your issues with jury instructions, amended Information; [Defense Counsel], at the end of the day—whatever day it was they all run together, you had mentioned additional witnesses that you may be asking the prosecutor's office to help you produce. Are we still talking about that, or—

[*Defense Counsel*]: No, Judge

[*Trial Court*]: —no, so that issue is no longer on the table. You're asking them to produce the woman from Weiss Essenberg—

[*The Prosecution*]: Essenberg

[*Trial Court*]: —Essenberg. And she will be here nine-o'clock Wednesday morning; so all of those issues have been resolved, is that fair enough.

[*Defense Counsel*]; Yes.

During the last day of trial, defendant did not call any witnesses and he chose to not testify on his own behalf:

[*Trial Court*]: Okay, so that's in there just in case; it's always easier to pull it out than to put it back in. So it's already in there you're welcome to take a look at those instructions if you desire to do so. So at this point in time, sir, you are exercising your right to not testify; is that true?

[*Defendant*]: Yes.

[*Trial Court*]: Okay, If I could go ahead—[Defense Counsel], go ahead and have a seat. And, [Defense Counsel], anything else that you would like to put on the record?

[*Defense Counsel*]: This does represent a change in circumstances, Judge, and so we were waiting on a witness that's why we—we bifurcated the trial basically. And so considering all the circumstances we will not be putting on proofs, Judge, we're not [going to] call that other witness.

On appeal, the prosecution argues that the witness from Weiss Essenberg would have been an expert witness for defendant because she was a child forensic interviewer who could have testified about the issues that defendant now raises on appeal.

It is clear that defense counsel had contemplated calling witnesses as well as expert witnesses. Defense counsel's trial strategy changed after he considered "all the circumstances." On appeal, defendant has not overcome the strong presumption that defense counsel's performance was born from a sound trial strategy because, even if defendant is correct that expert witnesses would have provided more depth to his defense, he has not established that calling those witnesses would have had reasonable probability of producing a different result. Specifically, defense counsel, during his closing argument, was able to argue that LL and SP provided fabricated testimonies, and he attempted to impeach their credibility by highlighting inconsistent statements in their testimonies. This is the same argument that defendant now claims he was deprived from presenting by not having an expert witness testify on his behalf. Furthermore, defendant ignores the fact that presenting an expert witness to testify about the interviews the victims participated in would have allowed the prosecution to rebut that evidence with testimony regarding the statements that the victims made in each interview to compare their consistency.

Therefore, we are not left with a definite and firm conviction that a mistake was made regarding any of defendant's arguments concerning his defense counsel's effectiveness.

Affirmed.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Anica Letica