STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN VICTOR BARTLETT, JR.,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 352470
Eaton Circuit Court
LC No. 2019-020132-FC

Before: MARKEY, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a); MCL 750.520b(2)(c) (sexual penetration involving victim under 13 years of age and defendant 18 years of age or older with prior CSC conviction involving victim under 13 years of age); one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a); MCL 750.520c(2)(b) (sexual contact involving victim under 13 years of age and defendant 17 years of age or older), second or subsequent CSC offense, MCL 750.520f; and one additional count of CSC-II, MCL 750.520c(1)(b) (sexual contact involving victim at least 13 but less than 16 years of age), second or subsequent CSC offense, MCL 750.520f. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to serve life in prison without the possibility of parole for his conviction of CSC-I, concurrent with 10 to 30 years' imprisonment for his convictions of CSC-II. Defendant appeals by right. We affirm.

I. FACTUAL BACKGROUND

Defendant was a coworker of Donald Trader, and they lived close to each other. The two became friends after defendant's young niece and nephew asked to spend the night with Trader's five grandchildren. Subsequently, Trader's grandchildren would visit and spend the night at defendant's home even when his niece and nephew were not present. Trader's eight-year-old granddaughter, IJ, testified that one morning, after spending the night at defendant's home, she went into his bedroom and asked for something to eat. IJ testified that defendant asked her to first cuddle with him and, after an initial hesitation, she climbed into his bed. IJ asserted that defendant slid his hand down her side, rubbed his penis in between her legs on her vagina, pushed her under

the covers, and then forced his penis into her mouth. IJ testified that defendant threatened that "something bad will happen" if she told anyone about the incident. IJ further indicated that she later told her cousin, 14-year-old GL, that defendant had touched her. Subsequently, at GL's urging, IJ told her mother that defendant had touched her.

GL testified that one evening when she spent the night at defendant's home, she was watching TV and complained that her back hurt, so defendant offered to rub lotion on her back. GL claimed that while he rubbed lotion on her back, defendant moved his hand under her pants and touched her butt. GL further testified that she disclosed the alleged sexual abuse at the same time as IJ's disclosure. Trader confronted defendant about the incidents, and defendant maintained that he did not touch the girls inappropriately and had only rubbed Calamine lotion on GL because she told him that her back was itchy.

IJ's paternal grandmother, Michelle Foy, who had enrolled IJ in counseling with therapist Debra Wright for adjustment issues before the sexual assault occurred, learned from IJ that something had happened at defendant's home but IJ did not want to elaborate. Wright testified that IJ disclosed during regular therapy sessions that defendant had sexually abused her, providing more details of the sexual assault over time and eventually telling Wright about the forced oral sex and the rubbing of genitals.

TP, who was dating IJ's father at the time of the sexual assault and was called as a witness for the defense, testified that IJ disclosed that defendant had touched her. TP had confided to IJ that she had been hurt when she was a child and that IJ should tell the truth about what happened to protect other children. TP was called as a defense witness because defendant attempted to use her testimony to show that TP, who had no experience or background in interviewing child victims of sexual assault, had implanted the idea of a sexual assault in IJ's mind. TP accompanied IJ to a therapy appointment with Wright. And at the appointment, IJ discussed the sexual abuse in more detail. Police officer Curtis McDaniel conducted two forensic interviews of IJ, but he was unable to elicit any information from IJ other than that defendant had touched her in bad places. IJ testified that she did not feel comfortable talking about details of the sexual assault to Officer McDaniel.

Defendant was charged with one count of CSC-I and two counts of CSC-II.[1] At trial, the prosecutor introduced other-acts evidence—two 1991 convictions of CSC-II involving two different victims under the age of 13 and testimony by defendant's adult daughter, SB, that defendant had rubbed his fingers and penis on her vagina when she was 9 or 10 years old. During the trial, the prosecutor called to the stand Thomas Cottrell, who was qualified as an expert on tactics commonly employed by child sexual offenders and typical patterns of behavior by sexually abused children. Cottrell testified about common misconceptions and classic victim behavior, including his opinion that it was common for children to delay disclosing sexual abuse and to only disclose abuse in piecemeal fashion. He indicated that children often believe that adults know more than they actually do, which explains why children sometimes make only partial disclosures

[1] The first two counts, CSC-I and CSC-II, pertained to complainant IJ, and the third count, CSC-II, concerned complainant GL.

of sexual abuse. Cottrell testified that he did not know any of the victims in the case and had not been given any of the investigative materials. The jury convicted defendant on all counts.

II. ANALYSIS

A. EXPERT TESTIMONY

Defendant first argues on appeal that he was denied his due process right to a fair trial when the prosecution presented expert testimony by Cottrell that impermissibly bolstered the credibility of IJ, GL, and SB because the opinion testimony spoke directly to the facts of the case instead of child sexual abuse victims in general. Defendant further contends that Wright also impermissibly bolstered IJ's credibility by testifying "that IJ needed the support of [TP] to make more late disclosures." Finally, in the alternative, defendant maintains that trial counsel was ineffective for failing to object to Wright's and Cottrell's testimony.

Generally, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Because defense counsel did not object at trial to the testimony now being challenged on appeal, the issue of improper bolstering is unpreserved. We review unpreserved arguments for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). To avoid forfeiture of the claim, a defendant must show that "(1) [an] error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* at 355. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even upon satisfaction of these three requirements, "[r]eversal is warranted only when the plain, unpreserved 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." *Jones*, 468 Mich at 355.

Whether counsel was ineffective presents a mixed question of fact and constitutional law, and factual findings are reviewed for clear error, whereas questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001), the Michigan Supreme Court recited the well-established principles governing a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test . . . . First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient

> performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and quotation marks omitted.]

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

MRE 702 governs the admissibility of expert testimony, providing as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Although an expert may be qualified to testify, it is "improper for . . . an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013).

In *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), our Supreme Court, examining the admissibility of expert testimony in sexual abuse cases involving child victims, held as follows:

> In these consolidated cases, we are asked to revisit our decision in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), and determine the proper scope of expert testimony in childhood sexual abuse cases. The question that arises in such cases is how a trial court must limit the testimony of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in *Beckley* that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in *Beckley* and now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

The Supreme Court then applied these principles to the particular facts presented in the case and concluded:

> [W]e first hold that in *Peterson*, the trial judge erred in the following areas. First, the experts in that case improperly vouched for the veracity of the child victim. For example, Gillan was allowed to testify that children lie about sexual

> abuse at a rate of about two percent. O'Melia was allowed to testify, over defense objection, that of the cases and studies he was familiar with, there is about an eighty-five percent rate of veracity among child abuse victims. Although we have no basis to dispute these numbers, their inherent inconsistency shows the difficulties that arise when attempting to vouch for the credibility of a witness. Certainly neither witness stated that the child victim was telling the truth. However, the risk here goes beyond such a direct reference. Indeed, as we have cautioned before, the jury in these credibility contests is looking "to hang its hat" on the testimony of witnesses it views as impartial. Such references to truthfulness . . . go beyond that which is allowed under MRE 702. [*Peterson*, 450 Mich at 375-376.]

More recently, the Michigan Supreme Court in *People v Thorpe*, 504 Mich 230; 934 NW2d 693 (2019), reaffirmed the principles set forth in *Peterson* and addressed testimony given by Cottrell—the same expert involved in the instant case. The *Thorpe* Court stated and held:

> We conclude that Thorpe has shown that it is more probable than not that a different outcome would have resulted without Cottrell's testimony that children lie about sexual abuse 2% to 4% of the time. In *Peterson*, this Court observed that nearly identical testimony allowed the experts in that case to improperly vouch for the veracity of the child victim. Here, not only did Cottrell opine that only 2% to 4% of children lie about sexual abuse, but he also identified only two specific scenarios in his experience when children might lie, neither of which applies in this case. As a result, although he did not actually say it, one might reasonably conclude on the basis of Cottrell's testimony that there was a 0% chance BG had lied about sexual abuse. In so doing, Cottrell for all intents and purposes vouched for BG's credibility. Furthermore, the prosecution's closing argument on rebuttal highlighted this improper evidence at a pivotal juncture at trial[.]
>
> * * *
>
> Thorpe's trial was a true credibility contest. There was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements. The prosecution's case consisted of BG's allegations, testimony by her mother regarding BG's disclosure of the alleged abuse and behavior throughout the summer and fall of 2012, and Cottrell's expert testimony. Thorpe testified in his own defense and denied the allegations. Additionally, Kimberly testified about other reasons for BG's behavior during the summer and fall of 2012; namely, that her mother had started a new relationship and become pregnant and that Thorpe had decided to no longer have parenting time with BG. Because the trial turned on the jury's assessment of BG's credibility, the improperly admitted testimony wherein Cottrell vouched for BG's credibility likely affected the jury's ultimate decision. Under these circumstances, we conclude that Thorpe has shown that it is more probable than not that a different outcome would have resulted without Cottrell's improper testimony. [*Thorpe*, 504 Mich at 259-260 (quotation marks and alterations omitted).]

In this case, Cottrell did not testify that sexual abuse occurred, did not vouch for IJ's, GL's, or SB's credibility or otherwise indicate that they were being truthful, did not opine that defendant was guilty, and did not testify with respect to a rate or percentage that children lie when alleging sexual abuse. Rather, Cottrell testified "in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a *victim's specific behavior* that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim[.]" *Peterson*, 450 Mich at 352 (emphasis added). Cottrell indicated that he did not know any of the complainants and had not reviewed any of the materials regarding the case. Cottrell opined that it was very common for children to delay in disclosing acts of sexual abuse, that partial or graduated disclosures of abuse are also very common, and that children around the age of eight years old "often assume that parents know everything," so it is not uncommon for such young children "to say x person touched me and then expect [a] parent to know everything that that child meant."

Defendant takes umbrage with Cottrell's testimony discussing eight-year-old children who allege being touched, as well as with the prosecutor's examination of Cottrell that involved questions couched in terms of the particular facts of the case, because Cottrell was only permitted to give expert testimony of a generalized nature. Defendant's argument lacks merit because it confuses proper opinion testimony that simply gives context to an opinion by using "a victim's specific behavior," *Peterson*, 450 Mich at 352, as a point or frame of reference with impermissible opinion testimony that asserts that a victim actually engaged in specific behavior or was being truthful. There was nothing improper in the prosecutor's asking Cottrell about disclosures of touching made by eight-year-old children and in Cottrell's answering that it is common for children around that age to vaguely refer to touching when first speaking to a parent about sexual abuse and then to subsequently elaborate regarding the abuse. The testimony was elicited because IJ's initial disclosure could have been construed by the jury as being inconsistent with that of an actual victim of sexual abuse. *Id.* In sum, Cottrell's testimony did not entail impermissible bolstering; therefore, the trial court did not plainly err by allowing the challenged testimony. Moreover, because the testimony was proper, defense counsel's failure to object to the testimony did not constitute ineffective assistance of counsel. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

With respect to defendant's argument that Wright impermissibly bolstered IJ's credibility by testifying that IJ needed the support of TP to make a disclosure of sexual abuse, we disagree. Wright testified that TP accompanied IJ to a counseling session, thereby giving IJ emotional support. The testimony at issue was as follows:

> *Q*. And what was the, I guess, setting of the session, then, that [IJ] had [TP] with her?
>
> *A*. That was in my office. [TP] didn't talk. She just held [IJ]'s hand as [IJ] revealed things that had happened.
>
> *Q*. Was [IJ] able to talk to you in more depth about what had happened with [TP] present?

A. Yes.

Q. As a therapist, do you know why?

A. 'Cause she needed the support of [TP], who is like her mom.

Wright did not vouch for IJ's credibility or otherwise testify or opine that IJ was telling the truth. Wright simply indicated that IJ was more comfortable speaking about the alleged sexual abuse during the therapy session because of TP's physical presence and emotional support. Indeed, defense counsel argued that IJ's more detailed disclosure at that counseling session was attributable to the fact that she was influenced by TP's own disclosure to IJ about TP's abuse. Further, although Wright testified that she assumed that what IJ had told her about the abuse was true, she testified that it was not her job to verify the truth of what IJ was saying. In sum, Wright's testimony did not entail impermissible bolstering; therefore, the trial court did not plainly err by allowing the challenged testimony. Moreover, because the testimony was proper, defense counsel's failure to object to the testimony did not constitute ineffective assistance of counsel. See *Ericksen*, 288 Mich App at 201.

B. HEARSAY

Defendant argues that his constitutional right to due process was violated when the trial court erroneously allowed repeated hearsay testimony regarding IJ's disclosures of sexual abuse. Defendant contends that therapist Wright, Officer McDaniel, Trader, and Foy each provided hearsay testimony and that none of the hearsay testimony fits within the tender-years exception to hearsay, MRE 803A. Defendant finally maintains, in the alternative, that trial counsel was ineffective for failing to object to the hearsay testimony.

" '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). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). "Hearsay is not admissible except as provided by" the Michigan Rules of Evidence. MRE 802.

MRE 803A, which is often referred to as the tender-years exception to the hearsay rule, provides, in pertinent part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. . . . .

IJ first told GL that defendant had touched her, and GL testified about that statement. IJ testified that she subsequently told her mother that she had been touched by defendant; IJ's mother did not testify at trial. With respect to Trader, he testified that he found out from IJ's mother[2] that IJ and GL had been inappropriately touched. This is the statement defendant challenges on appeal as constituting inadmissible hearsay. But defense counsel objected to the testimony, and the trial court sustained the objection. Moreover, the court later instructed the jury not to consider testimony that the court had struck during the trial. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) ("jurors are presumed to follow their instructions"). Trader then testified that he knew what had happened but did not know any of the details. Earlier in his testimony, the prosecutor specifically asked Trader to refrain from testifying about what he was told about the alleged abuse. To the extent that Trader testified to a statement made by declarant IJ about being touched, and setting aside for the moment the sustained objection, we note that the testimony was not offered to prove the truth of the matter asserted but instead to explain Trader's actions in confronting defendant and then defendant's response denying any inappropriate conduct. See *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995) (statements may be admitted to show the effect on the hearer or reader when the effect is relevant, as the policies underlying the hearsay rule are inapplicable because the statements are not being admitted to prove the truth or falsity of the matters asserted). In sum, defendant fails to identify any hearsay testimony by Trader that was admitted into evidence or any testimony that referred to a statement made by declarant IJ that was offered into evidence to prove the truth of the matter asserted. Thus, the trial court did not commit plain error, nor was there ineffective assistance of counsel relative to the admission of Trader's testimony.

With respect to Foy, IJ's grandmother, defendant points to her testimony in which Foy indicated that, upon inquiry, IJ told her that something had happened at defendant's home but that IJ "didn't want to talk about it." Considering the vague nature of Foy's testimony and the strength of the untainted evidence of guilt, we conclude that no prejudice has been demonstrated for purposes of the plain-error test and the claim of ineffective assistance of counsel. See *Carbin*, 463 Mich at 600; *Carines*, 460 Mich at 763. Moreover, the challenged testimony was not offered to prove the truth of the matter asserted; rather, it was offered to explain Foy's actions thereafter. Indeed, defense counsel had objected on hearsay grounds, and the trial court properly denied the

[2] IJ's mother is Trader's daughter.

objection on the basis that the prosecutor was not seeking to introduce the testimony to prove the truth of the matter asserted. Reversal is unwarranted.

With respect to Wright's testimony, she did testify that IJ had revealed to her that defendant had sexually abused her and that IJ provided more details about the abuse with every new therapy session. Wright testified that she prepared a report for the police in which Wright indicated that IJ had informed her during their sessions that defendant had twice put his penis in IJ's mouth and had also rubbed his penis on her vagina. While IJ had made earlier vague corroborative statements about being touched, the statements made to Wright were the first statements that actually corroborated IJ's trial testimony about forced fellatio and that defendant had rubbed his penis on her vagina. See MRE 803A (This rule of evidence addresses a statement that "corroborates testimony given by the declarant during the same proceeding," and "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule."). Wright's testimony also supported a conclusion that IJ's statements were spontaneous and without indication of manufacture and that any delay in making the statements to Wright were excusable because of IJ's fears and embarrassment. See MRE 803(A)(2) and (3).[3] Therefore, we conclude that Wright's testimony that actually corroborated IJ's trial testimony about the specific conduct

[3] Our concurring colleague writes that, "contrary to the analysis in the majority opinion, IJ's statements to Wright were subsequent disclosures that were not spontaneous." The concurrence bases this conclusion on Wright's testimony that she changed her counseling sessions with IJ because law enforcement asked her to see if she could elicit information from IJ about the alleged abuse. We do note, however, that the concurrence mistakenly makes the assumption premised on this testimony that Wright counseled IJ in a manner that made her claims of sexual abuse nonspontaneous and with indication of manufacture. But Wright also testified as follows:

> *Q*. As a therapist, were you putting pressure on [IJ] to talk to you about the sexual abuse?
>
> *A*. No.
>
> *Q*. So, that was all voluntary on [IJ].
>
> *A*. Yes.
>
> *Q*. And does she sort of direct the counseling sessions that you have?
>
> *A*. Yes.

This testimony supports our determination that MRE 803A(2) was satisfied. We do agree with the concurrence that Wright's testimony concerning explicit details of the sexual assault recounted by IJ was elicited by defense counsel. And as an additional basis to affirm on the issue, we agree with and adopt the analysis and conclusion of the concurrence that defendant waived the issue and that there was no associated ineffective assistance of counsel.

that formed the basis of the two charges was admissible under MRE 803A.[4] Accordingly, there was no plain error by the trial court in allowing the testimony, and trial counsel was not ineffective for failing to raise a meritless and futile objection.

With respect to Officer McDaniel's testimony, he indicated that during two forensic interviews with IJ, she informed him that defendant had touched her in "some really bad areas." But IJ never provided any details to Officer McDaniel. The testimony about being touched in bad areas was actually elicited by defense counsel on cross-examination of Officer McDaniel, although Officer McDaniel had briefly testified while being questioned by the prosecutor that IJ told him that defendant had touched her. In his brief on appeal, defendant does not identify any specific testimony given by Officer McDaniel; there is no citation to the record. The most detailed description of the touching arose from defense counsel's questioning; therefore, we view the issue as waived. See *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011) (counsel cannot harbor error in the lower court and then use that error as an appellate parachute); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the intentional relinquishment of a known right; one who waives his rights may not then seek appellate review of a claimed deprivation of those rights because the waiver has extinguished any error). In regard to the bootstrapped claim of ineffective assistance of counsel, we cannot conclude that defense counsel's performance in eliciting the testimony of abuse fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. As reflected in closing arguments, defendant emphasized that IJ did not provide any details of the alleged abuse to Officer McDaniel. Defendant argued that she only spoke in terms of touching, thereby calling into question IJ's testimony about oral sex and penile-to-vaginal contact and her overall credibility. Although defense counsel may not have expected Officer McDaniel's response that IJ indicated that the touching involved "some really bad areas," the response confirmed that IJ did not divulge acts of fellatio. See *Unger*, 278 Mich App at 243 (we shall not use the benefit of hindsight when assessing counsel's competence). Reversal is unwarranted.

C. OTHER-ACTS EVIDENCE

Defendant next argues that his constitutional right to due process was violated when the trial court allowed the prosecution to introduce unfairly prejudicial other-acts evidence concerning a claim by defendant's adult daughter SB that defendant sexually assaulted her years ago and defendant's prior CSC-II convictions in 1991 involving two victims under the age of 13. Finally, defendant contends, in the alternative, that trial counsel was ineffective by failing to object to the improper other-acts evidence.

MCL 768.27a(1) provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which

[4] On direct examination and in general terms, Wright testified several times that IJ had informed her that she had been sexually abused. To the extent that Wright should not have been permitted to so testify under MRE 803A, we find that the error was clearly not prejudicial.

it is relevant." In *People v Watkins*, 491 Mich 450, 455-456; 818 NW2d 296 (2012), our Supreme Court construed MCL 768.27a:

> We hold that MCL 768.27a irreconcilably conflicts with MRE 404(b), which bars the admission of other-acts evidence for the purpose of showing a defendant's propensity to commit similar acts, and that the statute prevails over the court rule because it does not impermissibly infringe on this Court's authority regarding rules of practice and procedure under Const 1963, art 6, § 5. We also hold that evidence admissible under MCL 768.27a remains subject to MRE 403, which provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value. In applying the balancing test in MRE 403 to evidence admissible under MCL 768.27a, however, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect.

MCL 768.27a permits the admission of "evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context." *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). The *Watkins* Court warned, however, that even though other-acts evidence can be admitted under the statute to show propensity, this does not mean that other-acts evidence can never be excluded under MRE 403 as overly prejudicial:

> There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Watkins*, 491 at 487-488.]

In this case, with respect to SB's testimony, defendant argues that the other-acts evidence was inadmissible because the allegations of sexual abuse occurred too many years ago, there was no associated conviction, and because the evidence was not necessary to prove IJ's and GL's allegations. Although the alleged sexual assault of SB occurred approximately 20 years earlier, this Court has noted that "MCL 768.27a does not contain a temporal limitation." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011).

Despite the age of the prior bad act, the details of SB's alleged assault were strikingly similar to the allegations by IJ and GL. Both SB and IJ testified that defendant rubbed his hand and penis against them at his home when the victims were 8 to 10 years old, and both SB and GL testified that defendant abused them at his home while they were lying on the floor watching TV as defendant rubbed their backs. This was strong propensity evidence which overcomes the lack of temporal proximity. Defendant also argues that SB's testimony had limited probative value because there was no evidence or conviction to corroborate her testimony. While MCL 768.27a is not limited to conduct that resulted in a conviction, the Michigan Supreme Court warned in *Watkins*, 491 Mich at 489, that whether the conduct resulted in a conviction is a relevant

consideration that must be weighed carefully under MRE 403. SB's testimony concerning the assault was exceptionally clear and incredibly detailed, as was her memory on all of the surrounding circumstances, including the name of the movie that was being played when the assault occurred and the color of her t-shirt. The lack of a conviction did not justify exclusion of her testimony; SB's testimony was sufficiently reliable to allow the admission of the other-acts evidence, and it was for the jury to assess her credibility. Additionally, because this case hinged on the credibility of the claims made by IJ and GL, there was a need for the propensity evidence.

Defendant further argues that the evidence of his CSC-II convictions in 1991 was unfairly prejudicial. At the trial, defense counsel stipulated to the admission of defendant's prior convictions. Accordingly, the issue was waived. See *Kowalski*, 489 Mich at 505; *Carter*, 462 Mich at 215. With respect to the accompanying claim of ineffective assistance of counsel, we assume that trial counsel concluded that the convictions were admissible and not worth challenging. We question that conclusion, as some type of challenge would have been reasonable. That said, we believe that the prior convictions were admissible under MCL 768.27a. Although decades had elapsed since the prior convictions, they involved two different victims under the age of 13 and were thus extremely probative of defendant's propensity to sexually abuse very young children. Therefore, we cannot conclude that counsel's waiver constituted deficient performance or that the requisite prejudice was shown. See *Carbin,* 463 Mich at 599-600; *Ericksen*, 288 Mich App at 201.

D. ADDITIONAL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Aside from the claims of ineffective assistance of counsel already addressed and rejected earlier, defendant also asserts that trial counsel was ineffective for failing to call an eyewitness to the alleged incident of sexual abuse committed against GL and for failing to seek the assistance of an expert in child psychology, child sexual abuse, forensic interview protocol, or any similar field.

With respect to the alleged eyewitness who was not called to the stand, defendant has not submitted any affidavits or other offer of proof showing what testimony this witness would have provided. There is nothing in the record revealing that this witness would have testified favorably for the defense. Accordingly, defendant has failed to establish the factual predicate for this claim of ineffective assistance of counsel. *Carbin,* 463 Mich at 600.

Finally, with respect to trial counsel's failure to utilize an expert witness, defendant argues that an expert was necessary to explain to the jury the reasons why there are such high standards and protocols when it comes to forensically interviewing children who have made allegations of sexual abuse. Cottrell testified as an expert in perpetrator tactics and typical victim behavior in child sexual abuse cases, and defense counsel was able to cross-examine Cottrell regarding instances in which accusers make varying allegations relative to the same event or identify the wrong perpetrator, memory issues, whether children have been improperly influenced by others, and the purpose of forensic interview techniques. Defense counsel also extensively questioned Officer McDaniel regarding forensic interviewing techniques and training. Although defendant argues that another expert was necessary, the jury had already heard why there are such high standards and protocols when it comes to forensically interviewing children who have made allegations of sexual abuse. Defendant has not shown or established that calling another expert

would have added anything to the testimony already presented to the jury. In sum, defendant has not demonstrated deficient performance or the requisite prejudice for purposes of this claim of ineffective assistance of counsel. *Carbin*, 463 Mich at 599-600.

We affirm.

/s/ Jane E. Markey
/s/ Mark T. Boonstra

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Eaton Circuit Court
LC No. 2019-020132-FC

Before: MARKEY, P.J., and BECKERING and BOONSTRA, JJ.

BECKERING, J., (*concurring*).

I concur in the result. I write separately because I disagree that the "tender years" hearsay exception in MRE 803A applied to the testimony provided by therapist Debra Wright. However, because any potential hearsay statements were elicited by defense counsel, defendant cannot establish that any error occurred.

Hearsay is defined as "a statement, other than 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 evidence is generally inadmissible unless there is an exception. MRE 802. One such exception to hearsay is the tender-years exception, MRE 803A, which excepts from hearsay a child's first disclosure of a sexual act. MRE 803A, in pertinent part, provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. [Emphasis added.]

In this case, IJ testified that she first disclosed the abuse to her cousin, GL, and then to her mother. GL testified about this initial disclosure at trial. Therefore, IJ's subsequent disclosures to Officer McDaniel, Wright, Donald Trader, and Michelle Foy do not fall under the tender-years exception to hearsay. MRE 803A.

Although IJ eventually disclosed additional details about the abuse to Wright, she testified at trial in regard to a single incident of abuse, which included defendant touching her side, rubbing his penis on her vagina, and forcing her to perform oral sex. In *People v Douglas*, 496 Mich 557, 575; 852 NW2d 587 (2014), the Michigan Supreme Court explained that although MRE 803A did not define the term "incident," it was commonly understood to mean "an occurrence or event," or "a distinct piece of action, as in a story." (Quotation marks and citation omitted.) The Court further concluded that "[t]here is no dispute here that the alleged fellatio and touching were distinct occurrences or events, separated by at least a number of months, taking place under different circumstances, and bearing no particular relation to one another beyond the parties involved." *Id*. at 575-576. As a result, the Court held that the victim's disclosure concerning fellatio during a forensic interview was not admissible pursuant to MRE 803A because she had already told her mother. *Id*. at 576. However, the forensic interviewer could testify about the separate touching incident because the victim had not disclosed anything about it before the interview. *Id*. at 576 n 5.

In this case, unlike the circumstances present in *Douglas*, IJ subsequently provided more details in regard to one "incident" or "event" during her sessions with Wright. The acts she described occurred on the same day at the same approximate time, and under the same circumstances—after defendant asked IJ to join him in his bed after she spent the night at his home. Additionally, the record indicates that IJ disclosed details about the abuse to her father's girlfriend, who attended IJ's next counseling session and held her hand while she spoke to Wright. Therefore, IJ's disclosures to Wright were not her first corroborative statements about "the incident" at issue. See MRE 803A. See also *People v Katt*, 468 Mich 272, 296; 662 NW2d 12 (2003) (explaining that the tender-years rule prefers a child's first statement over subsequent statements because "[a]s time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks").

In any event, in respect to Wright, defendant does not identify the specific testimony to which he objects on appeal. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims . . . ." *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015). Rather, defendant asserts that the

following testimony shows that any disclosures IJ made to Wright were not spontaneous as required by MRE 803A(2):

> *Q*. At some point in time, were you contacted by law enforcement about [IJ]?
>
> *A*. Yes.
>
> *Q*. And did that change your counseling sessions with [IJ], at all?
>
> *A*. Yes, 'cause there was a request to see if [IJ] could tell me anything.

I agree with defendant that IJ's disclosures were not spontaneous. In *People v Gursky*, 486 Mich 596, 614; 786 NW2d 579 (2010), our Supreme Court explained that "[o]pen-ended, nonleading questions that do not specifically suggest sexual abuse do not pose a problem with eliciting potentially false claims of sexual abuse." However, in a case in which "the initial questioning focuses on possible sexual abuse, the resultant answers are not spontaneous because they do not arise without external cause." *Id*. at 615. In this case, Wright testified that she altered her sessions with IJ in direct response to law enforcement's request to address the sexual abuse allegations. Further, by the time that IJ made her most detailed disclosure to Wright, she had participated in two separate forensic interviews with Officer McDaniel, spoken to members of her family, and written a letter to Wright concerning the abuse. Her father's girlfriend attended the counseling session and held her hand while she disclosed the details of the abuse to Wright. Even accepting that Wright was not specifically pushing IJ to reveal details about the abuse, she was aware that IJ previously disclosed sexual abuse. The girlfriend of IJ's father also knew about the sexual abuse and presumably attended the counseling session so that IJ would feel comfortable talking about it. Examining the surrounding circumstances and the context of the counseling sessions, I conclude that IJ's disclosures to Wright were not spontaneous as required by MRE 803A(2). *Id*.

Because I conclude that IJ's statements to Wright were not spontaneous pursuant to MRE 803A(2), I decline to address whether there is an indication that the statements were manufactured. MRE 803A requires both that the statement be spontaneous *and* without an indication of manufacture. "The language of MRE 803A(2) clearly demonstrates that spontaneity is an independent requirement of admissibility rather than one factor that weighs in favor of reliability or admissibility." *Gursky*, 486 Mich at 615. Accordingly, "because spontaneity is an independent requirement under MRE 803A(2) rather than one factor that weighs in favor of reliability and therefore admissibility, an overall sense of reliability or trustworthiness cannot render nonspontaneous statements admissible under MRE 803A." *Id*. at 617.

As a result, contrary to the analysis in the majority opinion, IJ's statements to Wright were subsequent disclosures that were not spontaneous. Nor, for that matter, were they IJ's first corroborative statements about "the incident" at issue. See MRE 803A. Accordingly, these statements were not admissible pursuant to MRE 803A.

In any event, any potential hearsay statements from Wright were elicited by defense counsel on cross-examination. On direct examination, Wright testified that the former girlfriend of IJ's father "held [IJ's] hand as [IJ] revealed things that had happened." However, Wright's

testimony does not recount any assertion made by IJ, so it is not hearsay. See MRE 801(c). On cross-examination, Wright testified that IJ revealed at her initial counseling session that defendant "had touched her," which prompted Wright to file a referral with Child Protective Services. Defense counsel asked Wright multiple questions about her written report to police, which she testified included statements by IJ that defendant held her down with a blanket, put his penis in her mouth twice, told her to lick it, took of her pants and underwear, and threatened to hurt her cousins and her brother. Even if this testimony would have otherwise been inadmissible hearsay had it been introduced by the prosecutor, "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Moreover, a review of the record indicates that defense counsel sought to elicit this testimony to show that IJ's allegations became more serious as the investigation progressed and IJ disclosed the abuse to additional people. As a result, counsel made a strategic decision to present such testimony to attack the victim's credibility. This Court will not second guess defense counsel's strategic decisions, and the "fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Therefore, defendant has not shown that any of Wright's testimony was erroneously admitted.[1]

Otherwise, I agree with the analysis in the majority opinion concerning the testimony provided by Officer McDaniel, Foy, and Trader. Even if any the testimony provided by these witnesses was inadmissible, defendant has not established error requiring reversal.

/s/ Jane M. Beckering

[1] Defendant also argues that Wright's testimony does not fall under the hearsay exception in MRE 803(4) for statements made for purposes of medical treatment or diagnosis. IJ did not disclose the abuse to Wright for the purpose of medical treatment. However, because Wright's testimony on direct examination was not hearsay, this exception is irrelevant to the resolution of defendant's claim on appeal.