STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT IRWIN STEWARD,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 351291
Wayne Circuit Court
LC No. 18-004064-01-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT IRWIN STEWARD,

Defendant-Appellant.

No. 351294
Wayne Circuit Court
LC No. 18-008561-01-FH

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant appeals as of right his bench trial convictions. In Docket No. 351291 (Lower Court Case No. 18-004064-01-FC), defendant was convicted of one count of indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c); and kidnapping, MCL 750.349. In Docket No. 351294 (Lower Court Case No. 18-008561-01-FH), defendant was convicted of one count of aggravated indecent exposure by a sexually delinquent person, MCL

[1] *People v Steward*, unpublished order of the Court of Appeals, entered November 7, 2019 (Docket Nos. 351291; 351294).

750.335a(2)(c). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 10 years and 6 months' to 20 years' imprisonment for each conviction. We affirm.

I. BACKGROUND FACTS

Defendant was 64 years old at the time of trial. Before the acts that gave rise to the charges in this matter, defendant was convicted in 1979 of a presumably misdemeanor charge of indecent exposure.[2] In 1985, defendant was convicted after entry of a plea of second-degree criminal sexual conduct (CSC-II) (victim less than 13 years of age), MCL 750.520c, for which he was sentenced to 3 to 15 years' imprisonment. In 1990, defendant was convicted by a jury of another charge of CSC-II (victim less than 13 years of age), MCL 750.520c, for which he was sentenced to 10 to 15 years' imprisonment. Both CSC-II convictions were in Kalamazoo Circuit Court. Defendant and the prosecution stipulated that in 1994 or 1995, during his incarceration, defendant underwent surgery at Foote Hospital that caused him to be unable to achieve an erection. Nevertheless, throughout his incarceration for the second CSC-II conviction, defendant accumulated a number of misconduct tickets and Michigan Department of Corrections (MDOC) reports based on inappropriate sexual conduct directed toward female prison staff, before and after 1995. Evidence of defendant's former convictions and his MDOC reports were admitted into evidence at trial.

In 2010, the young sister of defendant's then-wife, minor victim FH, was 10 years old and living with defendant along with FH's mother. FH testified that on one occasion, she was playing with her brother, who was hiding under a table, when defendant came into the room wearing only boxer shorts with his penis hanging out of the opening of the boxer shorts. FH's clothes were drying on the table and defendant set his penis on a pair of FH's panties. FH stated defendant told her "how it would be when [FH] started having sex and stuff." According to FH, defendant described his penis as "big, red, and hot." Defendant also described to FH how she "was supposed to hold [her] legs when [she did] finally have sex, and how it would hurt." FH reported the incident to her mother, who left the home with FH that day but, apparently, continued to reside nearby.

In 2013, FH went over to the house where her sister still lived with defendant to get her hair done, because the power was out at her own house. According to FH, she was doing her hair in front of the hallway mirror near the living room when defendant "came out of the room, and he was playing with his stuff . . . " Though defendant was wearing a robe, FH testified that the robe was open and defendant was "stroking" his penis and smiling at FH. FH started "screaming and crying" and she ran home to tell her mother and siblings. FH and her mother returned to the house, but they found the door locked. They reported the incident to the police. A preliminary examination was held in 2013, at which FH testified. It is not clear what happened thereafter, but apparently the matter was dropped at the time when FH and her mother were unable to "make it" to the trial.

[2] The 1979 case disposition document is difficult to read, but it appears there is a reference to "28.567," which could refer to the obsolete Michigan Statutes Annotated (MSA) numbering code for MCL 750.335a (indecent exposure). In any event, the parties do not dispute that defendant's 1979 conviction was a misdemeanor conviction for indecent exposure.

In January of 2018, minor victim AD, who was approximately two months short of 15 years old, began using a particular school bus stop. AD became aware of defendant because defendant brought his own children to the same bus stop. AD first noticed defendant's "inappropriate" behavior when defendant would "push his [penis] to one of [sic] his pants." AD stated this behavior made her feel uncomfortable because defendant would look directly at her while he did it. AD's friend TS, who was a little more than a year older than AD, also encountered defendant at the stop. TS reported that defendant would do "inappropriate things" while TS was waiting at the bus stop. For example, TS reported defendant told her "I'll do you dirty in them sheet [sic]" and "[y]ou should come over so we can have a play date." TS stated these statements made her feel "violated." Defendant would follow TS and, when she would try to move away defendant, would "tap" her on the shoulder. TS reported defendant would move his penis "from leg to leg like. And then he would, like, do it in front of me; or he would do it in front of me and his kids."

AD testified that in approximately February 2018,

> One day I came to the bus stop, and he was standing there. He had said, "[AD], I want to show you something, but I'm afraid you're going to tell." I turned around and said, "ok." And I turned back to where I was looking. And he said, "look." And he showed me—he opened up his coat and showed me his private area.

Though AD reported the incident to her teacher, her counselor, and her mother, no one immediately reported the incident to police. In approximately March 2018, another incident occurred. On that day, AD stated she was again waiting at the bus stop when some children approached, followed by defendant. The children diverted to a nearby parking lot, but defendant went to where AD was standing. The following events were described in AD's testimony:

> *Q*. So you said that you saw him, the Defendant, running toward where you were at the bus stop?
>
> *A*. Yes.
>
> *Q*. And then what happened next?
>
> *A*. He grabbed me. I had moved. And he said, "he was going to take me home with him."
>
> *Q*. Where did he grab you?
>
> *A*. My coat.
>
> *Q*. Okay.
>
> *A*. Like my collar.
>
> *Q*. Okay. And you're grabbing in the front of your body; is that right?
>
> *A*. Yes.

Q. And then you say you moved. What was the reason you moved?

A. How aggressively he grabbed me.

AD stated defendant only let her go when TS approached the bus stop. TS stated she did not see the incident, but observed AD "running home crying." As AD was leaving, she called 911 to report the incident. The police investigated, and defendant was charged as described based on the incidents with AD and with FH.

There were two lower court cases filed with these events, Docket No. 351294 and Docket No. 351291, respectively. Over defendant's objection, the trial court joined the cases, which were tried together in a bench trial. After the parties rested their cases, the prosecution moved to amend the date of offense listed in the information in Docket No. 351291 (involving AD), which originally listed the only March 13, 2018, as the date of offense. The prosecution sought to amend the information to list the date of offense as "February–March 2018." The trial court granted the motion over defendant's objection. Defendant was convicted on all counts. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

In Docket No. 351291, defendant argues there was insufficient evidence to convict him of kidnapping because defendant did not restrain AD for a sufficient period of time. Defendant also contends the prosecution failed to prove intent, because he claims the March 2018 restraint of AD was not related or incidental to the February 2018 indecent exposure incident also involving AD. We disagree.

A. STANDARD OF REVIEW

"This Court reviews a challenge to the sufficiency of the evidence de novo." *People v Bailey*, 330 Mich App 41, 46; 944 NW2d 370 (2019) (citation omitted). "Evidence is sufficient if, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Blevins*, 314 Mich App 339, 357; 886 NW2d 456 (2016) (quotation marks and citation omitted). "Direct and circumstantial evidence, including reasonable inferences arising from the use of circumstantial evidence, may provide sufficient proof to meet the elements of a crime." *Bailey*, 330 Mich App at 46. Defendant does not seriously challenge what the evidence shows in the abstract, but rather challenges the legal significance of that evidence. We review the interpretation of statutes de novo, applying plain and unambiguous language as written and giving "effect to every word, phrase, and clause to the extent possible." *People v Speed*, 331 Mich App 328, 331; 952 NW2d 550 (2020) (quotation marks and citation omitted). There is sufficient evidence to support a guilty verdict where "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation omitted).

B. LAW AND ANALYSIS

"[A] person commits the crime of kidnapping if he or she 'knowingly restrains another person with the intent' to commit a criminal sexual offense." *People v Anderson*, 331 Mich App

552, 562; 953 NW2d 451 (2020), quoting MCL 750.349(1)(c), or child sexually abusive activity, MCL 750.349(1)(f). Under MCL 750.349(2), the term "restrain" means:

> To restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.

Because a period of restraint "does not have to exist for any particular length of time," there is no merit to defendant's argument that the supposedly "brief" duration of his restraint of AD "was insufficient to support a conviction involving this serious charge."

The plain language of the statute also refutes defendant's argument regarding intent. Specifically, defendant contends that MCL 750.349 *requires* the restraint to be related or incidental to another criminal act. The statute states, "[t]he restraint . . . *may* be related or incidental to the commission of other criminal acts." MCL 750.349(2) (emphasis added). It is true that under rare circumstances, the word "may" can be deemed to impose a mandate, where such an interpretation is demanded by context. See *Kment v City of Detroit Police Dep't*, 109 Mich App 48, 61-64; 311 NW2d 306 (1981). However, "may" is typically permissive, whereas "shall" is necessarily mandatory. *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008); *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). Nothing in MCL 750.349 suggests that the word "may" should connote anything other than its ordinary meaning. Therefore, under the plain language of the statute, there is no requirement the prosecution have proven the restraint was "related or incidental" to a criminal act.

In any event, even if the statute did require the March 2018 restraint to be related or incidental to the February 2018 indecent exposure, the trial court reasonably found that the two incidents were related. In finding the intent element was satisfied, the trial court stated:

> The nature of the threat "I'm going to take you home with me" coupled with the course of conduct leading up to that day—the defendant exposing his penis to [AD], and showing her his penis under his clothes multiple times at the bus stop, defendant's intent to engage in criminal sexual conduct is inferred by his course of conduct which shows a pattern of increasingly becoming more sexual and aggressive with [AD] at the bus stop.
>
> Defendant's intent to commit criminal sexual conduct with [AD] or child sexually abusive activity is also corroborated by the Defendant's prior convictions of criminal sexual conduct against victims under 13, which are admissible under MCL 750.10a.

As noted, "[d]irect and circumstantial evidence, including reasonable inferences arising from the use of circumstantial evidence, may provide sufficient proof to meet the elements of a crime." *Bailey*, 330 Mich App at 46. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). It was proper to infer, based on the evidence that defendant's conduct toward AD showed a progression and some

indication of being specifically targeted at AD, in conjunction with defendant's extensive history of sexual misconduct in general,[3] that in fact defendant fully intended to commit yet another sexual offense in March 2018.

We finally note that at sentencing, defendant, addressing the trial court personally, protested that "[a]ccording to the standard of review in Michigan, as far as any criminal conviction for any charge there must be established the testimony of two or more witnesses." Defendant was incorrect. The trier of fact, which in this case was the trial court at defendant's insistence, may choose to find a single witness's testimony credible and find the essential elements of a crime proven beyond a reasonable doubt on the basis of that single witness's testimony alone. *People v Baskerville*, 333 Mich App 276, 283-284; ___ NW2d ___ (2020). The trier of fact may do so even where that witness's testimony might reasonably be deemed potentially problematic. *Id*. Although the Legislature requires "the testimony of 2 witnesses to the same overt act," absent a "confession in open court," to support a treason conviction, MCL 750.544, there is no two-witness requirement as to the crimes at issue here. We find no possible error in the trial court's determination that the victims in this case were credible, so we affirm defendant's kidnapping conviction.

III. OTHER-ACTS EVIDENCE

Defendant argues the trial court abused its discretion when it allowed the prosecution to admit other-acts evidence. We disagree.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Generally, "[a] trial court's decision to admit evidence will not be disturbed absent an abuse of discretion." *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). "However, whether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo." *Id*. "A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law." *Id*. Nevertheless, a "trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *People v Sabin*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Evidence is generally admissible if it is relevant, meaning it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v Zitka*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 349491, 349494); slip op at 3, quoting MRE 401. Evidence of a defendant's or a witness's prior conduct may generally be admitted into evidence pursuant to MRE 404(b), so long as that evidence is relevant for something other than *only* showing character or propensity. *People v Jackson*, 498 Mich 246, 258-260; 869 NW2d 253 (2015). In addition, "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 it is relevant." MCL 768.27a. Such evidence may be used to prove propensity or character. *People v Watkins*, 491 Mich 450, 469-470; 818 NW2d 296 (2012). Pursuant to MCL 768.27a(2), "listed offenses" include CSC-II, MCL 28.722(v)(*v*);

[3] The propriety of admitting that history into evidence will be discussed below.

aggravated indecent exposure involving a minor, MCL 28.722(r)(*ii*); offenses committed by a sexually delinquent person, MCL 28.722(r)(viii); kidnapping a minor, MCL 28.722(v)(*ii*), and "[a]ny other violation of a law . . . that by its nature constitutes a sexual offense against . . . a minor," MCL 28.722(r)(*vii*). Presently, MCL 28.722(r)(*ii*) refers specifically to the greater of two degrees of misdemeanor indecent exposure. However, in 1979, there were no internal degrees for misdemeanor indecent exposure. See 2005 PA 300.

However, under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See *Watkins*, 491 Mich at 481; *Jackson*, 498 Mich at 259-260. Evidence otherwise admitted under MRE 404(b) must be subjected to a "balancing test" under MRE 403 and excluded if there is an unacceptable likelihood that "the specter of impermissible character evidence" will be "significantly overshadowed by any legitimate probative value." *People v Crawford*, 458 Mich 376, 397-399; 582 NW2d 785 (1998). When considering whether evidence admissible under MCL 768.27a should be excluded under MRE 403, a trial court may consider:

> (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. [*Watkins*, 491 Mich at 487-488.]

Although "all evidence is prejudicial to some extent," *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002), "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (quotation omitted).

Defendant challenges three items of other-acts evidence: (1) defendant's two prior convictions of CSC-II; (2) defendant's 1979 conviction of indecent exposure; and (3) the MDOC reports detailing defendant's actions toward female MDOC staff.[4] Defendant's CSC-II convictions were admitted under MCL 768.27a. The prior indecent exposure conviction and the MDOC reports were admitted under MRE 404(b).[5] The admissibility of each item of evidence is considered in turn.

[4] The prosecution also admitted TS's testimony about defendant's behavior toward her as character evidence under MCL 768.27a. However, on appeal defendant does not contest the admission of TS's testimony. Thus, defendant has abandoned any argument challenging TS's testimony. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

[5] Neither the parties nor the court addressed the admissibility of this evidence under MCL 768.27b, and, therefore, we do not address that question.

B. MDOC REPORTS

Defendant does not challenge the admissibility of the MDOC reports under MRE 404(b), but rather argues that they should have been excluded pursuant to MRE 403. Defendant asserts that the admission of the MDOC reports was unfairly prejudicial under MRE 403 because his "inappropriate sexual behavior directed to the female guards is dissimilar to the other-acts related to his [CSC-II] convictions in Kalamazoo County versus the charged crimes in this case." We disagree.

The MDOC reports included a number of statements suggesting inappropriate sexual behavior by defendant. For example, one report indicated defendant "was standing . . . in the center of the floor with his penis in his hand massaging it in a back and forth stroking manner." Another report stated, defendant "nudged a paper . . . towards [the writer]. The paper stated I want to f*** you and put something up in you." And, one other report described defendant "pulled his zipper area open exposing his penis. [Defendant] was looking directly at this officer . . . "

The contents of the MDOC reports were substantially similar to both FH's and AD's trial testimonies. At trial, FH described that defendant "came out the room, and he was playing with his stuff while I was in the mirror." And, in describing the February 2018 incident, AD recounted how defendant told her he wanted to show her something, but was afraid she was going to tell. AD stated defendant then opened his coat, exposing his penis. The MDOC allegations and the charged offenses were similar in nature because they describe defendant making unsolicited sexual comments and exposing himself. Indeed, the only substantive difference is, as defendant points out, that the MDOC reports involved adult women, whereas the incidents at issue in these proceedings concerned young girls. However, the significance of that difference is blunted by the obvious fact that there would have been no young girls to target while in prison. Conversely, female prison staff would have been comparably situated to the young girls defendant targeted in this matter, insofar as they would have had relatively little ability to evade defendant. Furthermore, although prison guards would clearly be better able to physically protect themselves in general, the rules with which they must comply may hinder their practical ability to do so.

In any event, a "trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *Sabin*, 463 Mich at 67. Because the MDOC reports and the testimonies describing the charged offenses were similar in nature, trial court did not abuse its discretion in admitting the MDOC reports into evidence. Defendant's MRE 403 argument seems to be based on the proposition that the contents of the MDOC reports were improperly dissimilar to either his other prior convictions or his current charges. Having found the prison incidents properly similar, we reject defendant's MRE 403 challenge.

C. 1979 INDECENT EXPOSURE CONVICTION

Defendant also takes issue with the admission of his 1979 conviction of indecent exposure. Defendant opines the evidence was inadmissible as a scheme, plan, or system because the "purported connection of this admitted evidence to the crimes charged in these cases was circumstantial at best." Even supposing this to be true at face value, defendant merely relies on the common misapprehension that "circumstantial" evidence is somehow irrelevant. In fact, a criminal conviction may be sustained on the basis of circumstantial evidence, so long as it lends

itself to reasonable inferences beyond mere speculation. *People v Wang*, 505 Mich 239, 251; 952 NW2d 334 (2020). The logical relevance of prior acts of misconduct turns on whether those acts are sufficiently similar to show that they were all "manifestations of a common plan, scheme, or system." *Ackerman*, 257 Mich App at 440 (quotation omitted). "[T]he plan need not be unusual or distinctive; it need only exist to support the *inference* that the defendant employed that plan in committing the charged offense." *Id*. at 440-441 (quotation marks and citation omitted, emphasis added). Therefore, the connection does not need to be direct. Rather, the other-acts evidence need only lead to the inference that defendant applied the same plan during the current case. In this case, defendant was charged with two counts of indecent exposure by a sexually delinquent person. Because defendant's 1979 conviction was a similar charge of indecent exposure, it would not be unreasonable for the trial court to infer that defendant's prior behavior, resulting in his earlier conviction, comprised a similar scheme, plan, or system as in the current charges.[6]

D. CSC-II CONVICTIONS

Defendant's arguments as to the admissibility of the CSC-II convictions conflate the admissibility of other-acts evidence under MCL 768.27a with the admissibility of other-acts evidence under MRE 404(b). Defendant suggests the trial court abused its discretion in admitting the CSC-II convictions because the CSC-II convictions did not show a "common plan or system"—or, at the very least, the connection between the CSC-II convictions and the common plan or system was circumstantial. In making this argument, defendant appears to believe the trial court admitted the CSC-II convictions under MRE 404(b). That is not the case. This evidence was admitted under MCL 768.27a. As noted above, all of the prior convictions and presently charged offenses are "listed offenses" for purposes of MCL 768.27a. Furthermore, as noted above, circumstantial evidence is not irrelevant evidence. *Wang*, 505 Mich at 251. Consequently, the trial court did not err in admitting evidence of the CSC-II convictions. MCL 768.27a. To the extent defendant contends it was an abuse of discretion for the trial court to admit otherwise admissible evidence, defendant's sparse arguments on appeal fail to establish the factual predicate necessary to make this conclusion. See e.g., *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001).[7]

IV. AMENDMENT

In Docket No. 351291, regarding the charges involving AD, defendant argues the trial court abused its discretion when it allowed the prosecution to amend the information to change the date

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[6] We note that his 1979 conviction of indecent exposure would also have almost certainly have been independently admissible pursuant to MCL 768.27a(2) and MCL 28.722(r)(*ii*), if it had involved a minor, which is not apparent from the record. Nonetheless, even if there was error in admitting the 1979 conviction pursuant to MRE 404(b), any such error was likely harmless in light of the properly admitted other-acts evidence, including FH's testimony and defendant's prior CSC convictions. See e.g., *People v Pesquera*, 244 Mich App 305, 319-320; 625 NW2d 407 (2001).

[7] Defendant also appears to raise a constitutional argument that the admission of the other-acts evidence violated his right to a fair trial. However, defendant fails to develop this argument, so we consider the argument abandoned on appeal. *McPherson*, 263 Mich App at 136.

of offense from March 13, 2018, to "February–March 2018." Defendant believes he was unfairly surprised and prejudiced by this amendment. We disagree.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

"A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003) (citation omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "The indictment or information shall contain . . . [t]he time of the offense as near as may be." MCL 767.45(1)(b). However, "[n]o variance as to time shall be fatal unless time is of the essence of the offense." *Id*. Furthermore:

> An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. [*People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), citing MCL 767.67.]

"The court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H). In other words, although an amendment may occur at any time in the proceedings, it may be subject to exclusion if it unfairly surprises or prejudices the defendant.

B. ANALYSIS

As an initial matter, defendant was charged with two offenses regarding AD: kidnapping and indecent exposure by a sexually delinquent person. Although defendant disputes whether a kidnapping occurred at all, there is no dispute and no confusion that only one instance of kidnapping was alleged and that it was alleged to have occurred on March 13, 2018. Indeed, defendant makes no argument otherwise. Rather, he argues only that he was prejudiced because his defense was premised on his belief that the prosecution had alleged a single instance of indecent exposure involving AD on March 13, 2018. Defendant therefore implicitly concedes that he was not prejudiced as to the kidnapping charge, or he has abandoned any argument that he was prejudiced as to the kidnapping charge.

Regarding the indecent exposure incident involving AD, during closing argument, defense counsel asked the trial court to strike the charge because "[t]here was no testimony on this record that [defendant] exposed himself to [AD] in March of 2018, none whatsoever." Similarly, during his opening statement, defense counsel contended that the prosecutor's "biggest problem is that the indecent exposure did not occur in March, if it occurred at all." Defense counsel asserted during closing argument that the prosecution was attempting to "bootstrap" the indecent exposure charge with the kidnapping charge. However, at the same time, defense counsel explicitly recognized that "[AD] testified to an exposure, an alleged exposure, in February 2018." Indeed, AD's testimony during the preliminary examination described the alleged indecent exposure incident and that it occurred in February 2018. At the beginning of defendant's cross-examination

of AD, defendant confirmed that "the first alleged incident with [defendant] took place in February of 2018." Defendant closely and extensively cross-examined, and recross-examined, AD regarding the circumstances and details of the February 2018 indecent exposure, including what AD did or did not tell other people in response to that incident.

"Where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial." *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998).[8] Defendant was obviously very much aware of when the indecent exposure was *substantively* alleged to have occurred. Furthermore, notwithstanding his claim that he would have conducted his cross-examination of AD differently, defendant does not explain how he would have done so, nor does it appear that AD was less than thoroughly cross-examined regarding the indecent exposure incident. The only conceivable prejudice apparent or inferrable from the record is that defendant attempted to rely tactically on a discrepancy between the date on the information and the date on which everyone knew the indecent exposure was alleged to have occurred. Importantly, however, time is not of the essence to a charge of indecent exposure. See MCL 750.335a(1) ("A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another."). Defendant's request to strike the charge on that basis would therefore have been properly denied in any event. Finally, we note that this was a bench trial, so the amendment had little chance of confusing the trier of fact.[9]

Defendant argues on appeal that this Court should follow the dissenting opinion in *People v Jones*, 486 Mich 920, 922-924; 781 NW2d 799 (2010) (KELLY, C.J., dissenting). The *Jones* dissent disagreed with the majority's decision to deny the defendant's application for leave to appeal. *Id*. at 922. The victim claimed he was sexually abused by the defendant after the defendant drove the victim home from school. *Id*. However, the date of the alleged offense cited by the prosecution in the information was not a date the defendant could drive, and it conflicted with other provable facts, like the victim's school grade at the time and whether the victim's grandfather had died before or after the alleged offense. *Id*. at 923. At trial, the defense's questioning of witnesses centered on this discrepancy and established that the alleged assault could not have occurred on the charged date. *Id*. at 923-924. The trial court then amended the information after proofs were closed and defendant could not cross-examine critical witnesses. *Id*. at 924. Because the defendant's defense had focused on that implausibility, the dissent opined that leave to appeal was necessary to determine whether defendant was unfairly surprised or prejudiced by the amendment to the information. *Id*. In contrast here, nothing about the difference of one month

[8] Although *Goecke* addressed the reinstatement of an erroneously dismissed charge, the principles of avoiding prejudice due to unfair surprise, insufficient notice, or a lack of opportunity to defend are equally applicable here.

[9] If defendant had asked the trial court to permit him to supplement his closing argument in light of the amendment to the information, it might have been an abuse of discretion for the trial court to deny that request. After granting the amendment, the trial court did ask counsel if they had anything further to say before proceeding to the verdict, and both counsel declined.

would have rendered the charge of indecent exposure intrinsically implausible, so even if we were to adopt the reasoning in Justice KELLY's dissent in *Jones*, it would not apply to these facts.

We conclude that defendant was not surprised or unfairly prejudiced by the amendment to the information, because there was never any substantive confusion about when the indecent exposure involving AD was alleged to have occurred, time is not of the essence to a charge of indecent exposure, defendant actually cross-examined AD thoroughly regarding the incident of indecent exposure, and nothing about the date discrepancy calls the plausibility of the charge into doubt. Because defendant was not unfairly surprised or prejudiced by the amendment, the trial court did not abuse its discretion in granting the prosecution's motion to amend.[10]

V. JOINDER

Defendant argues he was denied a fair trial when the trial court joined the cases underlying Docket No. 351291 and Docket No. 351294 because the cases were not sufficiently related to permit their joinder. We agree that the cases do not arise from the same series of events. Nevertheless, we conclude that the trial court did not abuse its discretion in joining the cases because evidence of defendant's conduct was admissible evidence in the respective cases, and the bench trial reduces the likelihood that the trier of fact would have misused the evidence.

A. STANDARD OF REVIEW

Joinder "presents a mixed question of fact and law," so "it is subject to both a clear error and a de novo standard of review." *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). "To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *Id*. The trial court's factual findings are reviewed for clear error, and questions of law, including the interpretation of a court rule, are reviewed de novo. *Id*. However, it is ultimately discretionary with the trial court whether it is appropriate to grant permissive joinder of related charges. *People v Breidenbach*, 489 Mich 1, 14-15; 798 NW2d 738 (2011).

B. LAW AND ANALYSIS

Under MCR 6.120(B), a trial court may "join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." "Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1)(c). MCR 6.120(B)(1)(c) states that "multiple offenses may be 'related' as part of a single scheme or

[10] Again, defendant apparently makes a constitutional argument that the amendment to the information was in violation of his rights under the Fourteenth Amendment. Defendant does not provide any explanation or context for this argument and we consider it abandoned. *McPherson*, 263 Mich App at 136.

plan despite a lack of temporal proximity." *Williams*, 483 Mich at 241 n 18.[11] Similarly, offenses may be related under MCR 6.120(B)(1)(c) even if they concern different crimes against different victims. See e.g., *Williams*, 483 Mich at 248-249.

The trial court granted the prosecution's motion for joinder "[g]iven that the alleged conduct by the Defendant in both of these cases is nearly identical, they both constitute . . . a single scheme or plan . . . " In support of this finding, the trial court pointed out that Docket No. 351294 arose "out of the exposure of [defendant's] penis to his minor daughter-in-law (sic)," and Docket No. 351291 "[arose] out of exposure of his penis to a minor at a bus stop." According to defendant, the trial court erred because the cases were unrelated and "[t]he offenses were spontaneous responses to two different complainants on different dates and in different location." Our Supreme Court has explained that two offenses may be related for purposes of joinder under MCR 6.120(B)(1)(c) despite occurring at different times, but two offenses are not necessarily related "simply because they were of the same or similar character." *Williams*, 483 Mich at 234-235. Rather, the relevant question is whether the two offenses were "ongoing acts constituting parts of [an] overall scheme or plan." *Id.* at 235. Importantly, this analysis is distinct from the analysis under MRE 404(b), under which it is sufficient for the evidence to support an inference of a common plan, scheme, or system, and there is no need for such a plan to be particularly distinctive. See *Ackerman*, 257 Mich App at 440-441 (emphasis added). However, under the rules for joinder, the evidence must show that the acts were not merely reflective of a common methodology, but were actually components of a single overall scheme or plan. *Williams*, 483 Mich at 234.

Under the circumstances, we are inclined to agree with defendant. However similar his acts of indecent exposure were, or however indicative they were of defendant employing the same general way of targeting or interacting with his victims, there was no evidence showing that he targeted FH and AD pursuant to a *single* scheme or plan to target *both* of them. His conduct appears to have been sufficiently methodical to warrant admission under MRE 404(b), but defendant's overall methodology appears to have been based on targeting victims who happened to be available to him. Thus, it seems each case arose from coincidental interactions between defendant and the victims—defendant seeing FH in the hallway when she came to his house to do her hair and defendant's and AD's daily interactions at the bus stop.

Nevertheless, the fact that the two acts of indecent exposure were not directly linked to each other is irrelevant. Joinder is independently appropriate if the commonality of a defendant's scheme or plan would make each offense admissible into evidence at trial for the other offense. *Williams*, 483 Mich at 236-237, citing *United States v Harris*, 635 F2d 526, 527 (CA 6, 1980) ("The admissibility of evidence in other trials is an important consideration because '[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial.' "). In other words, even if the trial court denied the prosecution's motion for joinder on the basis of its conclusion that the two offenses were not related, evidence of both offenses would nonetheless be admissible in separate trials.

[11] In *Williams*, our Supreme Court discussed a version of MCR 6.120 as it existed prior to an amendment that reorganized—but did not substantively change the contents—of what is now MCR 6.120(B)(1). See *Williams*, 483 Mich at 233 n 5.

Indeed, the prosecution recognized this in its motion for joinder, noting that if the trial court denied the motion, the prosecution would introduce evidence of the respective offenses through other-acts evidence.

MCL 768.27a states that when a "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 it is relevant." Kidnapping a minor, indecent exposure by a sexually delinquent person, and aggravated indecent exposure by a sexually delinquent person are "listed offense[s]" under the statute, and are therefore admissible so long as they are relevant to the matter. MCL 28.722(r)(*viii*) and (v)(*ii*); see discussion *supra*. Thus, even if these incidents are not "related" under MCR 6.120(B), they are nevertheless admissible under MCL 768.27a.[12] Because evidence of each offense was admissible under MCL 768.27a, defendant cannot have been prejudiced by the joinder "more than he would have been by the admissibility of the other evidence in a separate trial." *Williams*, 483 Mich at 237 (quotation omitted). Consequently, principles of judicial efficiency and alleviating the need for witnesses to testify to the same events multiple times favored conducting a single trial. See *People v Mayfield*, 221 Mich App 656, 659; 562 NW2d 272 (1997). The trial court did not abuse its discretion in joining the two cases.

Affirmed.

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica

[12] Defendant contends each incident was inadmissible MRE 404(b) evidence. However, because these offenses concern "a listed offense against a minor," this Court's analysis of admissibility is under MCL 768.27a, not MRE 404(b) as defendant suggests.