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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY FARREN BUCHNER,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 351701
Eaton Circuit Court
LC No. 2018-020356-FC

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (sexual penetration of victim under age 13 by defendant age 17 or older) (two counts), and MCL 750.520b(1)(b)(*i*) (sexual penetration of victim between 13 and 16 years of age and a member of the same household) (one count); and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*i*) (sexual contact with victim between 13 and 16 years of age and a member of the same household). Defendant was sentenced to serve 50 to 90 years' imprisonment for his CSC-I convictions, concurrent with 10 to 15 years' imprisonment for his CSC-II convictions. Defendant appeals by right. Defendant argues that he is entitled to a new trial because the prosecutor elicited inadmissible hearsay testimony; an expert witness invaded the province of the jury by commenting on the complainant's credibility; and trial counsel was ineffective for failing to object to the hearsay testimony and the expert witness's testimony, failing to impeach the complainant and another witness with the complainant's prior inconsistent statements, failing to file a motion to suppress defendant's statements to police, and failing to call an additional witness. Defendant also argues that the trial court abused its discretion by imposing a sentence that departed from the minimum guidelines range. We affirm.

I. FACTUAL BACKGROUND

Defendant was accused of sexually abusing KT for multiple years when KT was 10 to 13 years old. Defendant had been in a dating relationship with KT's mother, GB, since KT was six years old, shortly after KT's father died. KT testified that on multiple occasions, defendant fingered and licked her vagina, rubbed his penis inside her vagina, sucked on her breasts, kissed

her on the lips, put his penis in her butt, and made her suck his penis. She testified that on multiple occasions, defendant would ask her to get in the shower with him. Once there, defendant would wash her body, make her wash his body, and make her suck his penis. She also described more than one occasion on which defendant tied her ankles and wrists to his bed, covered her face with a red bandana or a Halloween mask, then sexually assaulted her. KT testified that she would repeatedly scream "No," and testified that it was very painful. KT testified that her mother was at work when the abuse occurred. KT described another specific incident in which defendant made her shower with him, washed her, then followed her into her bedroom, pulled down her shorts, and licked her vagina. KT testified that defendant told her that if she let him do what he wanted, he would buy her a phone, and that he purchased her a phone the day after this incident. The next week, KT expressed suicidal ideations at school, and disclosed the abuse to school counselors. She stated that she had made previous disclosures to her friend, CM; her ex-boyfriend, GL; and her mother. KT's mother denied that KT disclosed the abuse and further stated that she did not believe KT. She voluntarily surrendered her parental rights to KT and married defendant.

A detective and a CPS investigator conducted a forensic interview with KT, who described defendant's sexual abuse in detail. That same day, the detective asked defendant to come in for an interview, and defendant agreed. Defendant reported that he had ingested a few shots of tequila, so the detective offered to give him a ride to the police station, and defendant agreed. Defendant denied sexually abusing KT, although he stated that he had showered with her before. Defendant claimed that he had washed KT's hair while she was in the shower that week, but denied that he washed her body.

At trial, Dr. Stephen Guertin was qualified as an expert in issues of child abuse and sexual abuse, and testified that he had evaluated KT. He stated that KT had been too embarrassed to participate in a physical examination, but he had taken her history and she described the abuse. Dr. Guertin took blood samples from KT to test her for sexually transmitted infections. KT's friend, CM, testified that KT disclosed the abuse to her when she was in fourth grade, and CM stated that she reported it to their fourth-grade teacher. GL also acknowledged that KT had disclosed the abuse to him. Defendant's adult daughter, KV, testified that when she was 14 years old, defendant had inappropriately touched her. She testified that while staying overnight at defendant's home, defendant had tried to unhook her bra and massage her breasts, then straddled her while he was naked. KV testified that she eventually got away from defendant and reported the incident to police, although nothing ever came of it. The jury found defendant guilty of three counts of CSC-I and two counts of CSC-II.

At sentencing, KT discussed how defendant's actions affected her life. She stated that she had lost her self-confidence, felt trapped, and became suicidal. She stated that she was on medication and was receiving therapy, but had been through multiple foster home placements and was eventually placed in a residential facility. She stated that she was learning to be a strong person, but she was not over it. The prosecutor argued that defendant had little chance for rehabilitation because he had not admitted that he had a problem, and argued that the court should use defendant's sentencing as both punishment and to create a deterrent effect for these types of crimes. He also stated that a longer sentence would protect other victims from defendant because he would likely have done it again. The trial court agreed with the prosecutor and sentenced defendant to 50 to 90 years' imprisonment for CSC-I, an upward departure of 315 months from

the minimum guidelines range; and 10 to 15 years' imprisonment for CSC-II, an upward departure of 20 months from the minimum guidelines range.

II. ANALYSIS

A. HEARSAY

Defendant first argues that the trial court abused its discretion by allowing the prosecutor to elicit inadmissible hearsay testimony from CM, GL, the detective, and Dr. Guertin. We disagree.

Defendant did not preserve this issue by making a timely objection at trial. *People v Considine,* 196 Mich App 160, 162; 492 NW2d 465 (1992). We review unpreserved errors for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 356; 622 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).

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. However, if "the proponent of the evidence offers the statement for a purpose other than to prove the truth of the matter asserted, then the statement, by definition, is not hearsay." *People v Musser*, 494 Mich 337, 350; 835 NW2d 219 (2013), citing MRE 801(c).

Defendant first argues that CM's testimony constituted inadmissible hearsay. When asked if KT had "told [her] about something that was going on with [defendant]," CM said yes. CM then described KT's demeanor during the conversation and stated that the disclosure happened when she and KT were in fourth grade. MRE 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." In this case, CM did not repeat any oral or written assertions that KT made. Therefore, her testimony was not hearsay. Similarly, defendant argues that GL's testimony constituted inadmissible hearsay. However, GL did not testify to any statements that KT made, but simply confirmed that she had made a disclosure:

> *Q*. Was there a time that [KT] told you about some things that [defendant] did to her?
>
> *A*. Yes.

This testimony was not hearsay. The only testimony by GL that could be considered hearsay was elicited on cross-examination by defense counsel, and "[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).

Defendant next argues that the detective's testimony constituted inadmissible hearsay. However, none of his testimony was hearsay because it was not offered to prove the truth of the matter asserted, but was offered to explain the detective's investigation. We have held that "a statement offered to show why police officers acted as they did is not hearsay." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). In this case, the detective indicated that he told KT's mother about the disclosure to explain the context of his conversation with KT's mother and explain his next step in the investigation. Similarly, he testified that he built a rapport with KT during the forensic interview and that she disclosed abuse, but he did not repeat any statements that she made. These statements were not hearsay both because they were not "statements" by KT pursuant to MRE 801(a) and because the testimony explained why the detective acted as he did.

Defendant next argues that Dr. Guertin's testimony was inadmissible hearsay. Unlike CM's and GL's testimony, Dr. Guertin did testify regarding specific statements that KT made. However, the testimony was not hearsay, because it fell under MRE 803(4), which excludes from the hearsay rule "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." MRE 803(4). As we discussed in *People v Shaw*, 315 Mich App 668, 674-675; 892 NW2d 15 (2016) (quotation marks and citations omitted; alteration in original):

> The rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient. An injury need not be readily apparent. Moreover, [p]articularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.

In this case, Dr. Guertin testified that he asked children to give him histories of alleged abuse to help him anticipate potential injuries that could be revealed during the physical examination, determine if the child needed to be tested for sexually transmitted disease, and to provide treatment for sexual abuse if the physical exam is normal. In this case, KT's history provided Dr. Guertin enough information to test KT's blood for sexually transmitted disease. Therefore, Dr. Guertin's collection of KT's history was for purposes of medical diagnosis and treatment.

Defendant argues that *Shaw*, 315 Mich App at 675, supports his argument that MRE 803(4) did not apply to Dr. Guertin's testimony. In *Shaw*, *id.* at 671, the victim, at 23 years old, reported that her stepfather had sexually assaulted her on multiple occasions when she was between the ages of 8 and 16. Dr. Guertin conducted a forensic physical examination of the complainant and at trial, recounted in detail the complainant's statements to him about the abuse. *Id.* at 674. We determined that the medical treatment exception to hearsay under MRE 803(4) did not apply to Dr. Guertin's testimony because the examination did not occur until seven years after the last alleged instance of abuse and the complainant had visited another doctor for gynecological care in

the meantime. *Id*. at 675. This case is distinguishable from *Shaw*. Unlike in *Shaw*, *id*. at 674, in this case, Dr. Guertin evaluated KT approximately one to two weeks after the last alleged assault and KT had not seen another physician for treatment regarding the alleged abuse. In fact, Dr. Guertin provided some preliminary medical treatment for KT based on her disclosure by testing her for sexually transmitted disease. The *Shaw* Court did not rule that MRE 803(4) was not applicable on the sole basis that the victim had visited Dr. Guertin in connection with a police investigation. Therefore, Dr. Guertin's testimony was admissible under MRE 803(4) as statements made for medical diagnosis and treatment.

Defendant also argues that Dr. Guertin's testimony that KT identified him as the perpetrator was unnecessary for medical treatment. During direct examination, Dr. Guertin testified that KT identified defendant as the person who committed the assaults. In *People v LaLone,* 432 Mich 103, 115-116; 437 NW2d 611 (1989), our Supreme Court held that statements in which a complainant told a psychologist that she was sexually abused by her stepfather were inadmissible. The Court stated that "the identity of an assailant cannot fairly be characterized as the 'general cause' of an injury," *id.* at 113, and that "[i]t has long been the rule that the declarant's naming of the person responsible for his condition may not be admitted pursuant to the hearsay exception described in MRE 803(4)," *id.* at 110. The *LaLone* Court held that the victim's statement was inadmissible in part because the statements "were made to a psychologist rather than to a physician and this suggests that the statement by the victim in this case may be less reliable than a statement made to a physician." *Id.* at 113. The Court recognized that while the identity of an assailant could be relevant to psychological treatment, the statement in that case did not have the reliability necessary to satisfy MRE 803(4) because the complainant made her disclosure after she made her initial accusation. *Id.* at 114. However, this case is distinguishable from *LaLone*, *id*. at 114, because there were few indications that KT's disclosure to Dr. Guertin was unreliable. Dr. Guertin conducted his examination approximately two weeks after the initial disclosure, and the incidents that KT reported to him were consistent with the acts she described in her forensic interview and at trial. Dr. Guertin also specifically testified that he "need[ed] to know the relationship of the person that may have molested the child because part of this, part of treatment is to make some assessment as to whether or not the child is protected." Therefore, KT's identification of defendant was a necessary element of Dr. Guertin's evaluation and had sufficient reliability to satisfy MRE 803(4).

B. EXPERT TESTIMONY

Defendant next argues that Dr. Guertin's testimony improperly invaded the province of the jury because he vouched for KT's credibility by asserting that he believed her statements. We disagree.

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). Defense counsel did not object to Dr. Guertin's testimony at trial, so this issue is unpreserved. We review unpreserved errors for plain error affecting substantial rights. *Jones*, 468 Mich at 356.

Although expert testimony is generally admissible under MRE 702,[1] "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *Musser*, 494 Mich at 349. Regarding expert opinions of child sexual abuse, our Supreme Court has stated: "[E]xamining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *People v Thorpe,* 504 Mich 230, 235; 934 NW2d 693 (2019).

In this case, during cross-examination, Dr. Guertin discussed KT's disclosures:

> *Q*. Are you saying that there may be things, in what you just testified that she told you, that may be incorrect?
>
> *A*. I don't believe so, but I cannot say for certain—I cannot attest to the truth of what she said.
>
> *Q*. I'm not asking—
>
> *A*. I can tell you what she said.
>
> *Q*. I'm not asking you that. What I'm asking you—and I'm very clear about that—is all you have in your report—
>
> *A*. Yes.
>
> *Q*. —is what [KT] told you.
>
> *A*. Yes, there could be more.
>
> *Q*. But as far as you know, what's in your report is what she told you.
>
> *A*. As far as I know, what's in my report is what happened to her, yes.

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[1] MRE 702 provides:

> 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.

> *Q*. Could you please explain that, as to what happened to her? Is that what she told you?
>
> *A*. Yes. Now, there may have been more, but this is what she told me.
>
> *Q*. Right. Well, my—my concern is that you said this is what happened to her. Could you explain that, because I really don't understand that?
>
> *A*. Yes. So, when we take a medical history, we expect the patient to tell us what their symptoms are or what has happened to them. And we take that as what happened to them. So, I take this as what happened to her. Maybe more happened to her. Maybe she didn't tell me everything. But I take it that the things that she told me are things that happened to her, yes.
>
> *Q*. Okay. So, she told you a story, you wrote it down, and that's what you know at that point; correct? Is that fair to say?
>
> *A*. Yes.

As a preliminary matter, the testimony that defendant argues invaded the province of the jury was elicited by defense counsel on cross-examination. Although defendant claims that his counsel was ineffective for eliciting this testimony, defendant has waived his claim that the testimony itself was error because "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *Green*, 228 Mich App at 691. Even if defendant had not waived this issue, he has not shown that Dr. Guertin's testimony was error. Unlike in *Thorpe*, 504 Mich at 143-145, in which the expert diagnosed the complainants with probable pediatric sexual abuse, in this case, Dr. Guertin's did not definitively claim that KT was sexually abused. Rather, he stated that he took KT's statements "as what happened to her," for purposes of diagnosis and treatment, and he explained that he only had her statements to consider when conducting his evaluation. In other words, Dr. Guertin acted on the assumption that she was telling the truth so he could continue treatment, such as ordering blood tests. Dr. Guertin was careful to say that there may have been more to the story than he was told, and clearly stated that he "cannot attest to the truth of what she said." Therefore, Dr. Guertin's testimony did not improperly invade the province of the jury.

C. INEFFECTIVE ASSISTANCE

Defendant argues that his trial counsel was ineffective by failing to object to hearsay testimony, asking questions of Dr. Guertin that opened the door for him to vouch for KT's credibility, failing to file a pretrial motion to suppress defendant's involuntary statements to police, failing to impeach KT and the CPS investigator with KT's forensic interview statements, and failing to call KT's fourth-grade teacher as a witness. We disagree.

Defendant preserved this issue by moving for a new trial or an evidentiary hearing to develop the record, *People v Ginther*, 300 Mich 436, 442-443; 212 NW2d 922 (1973); *People v Sabin,* 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Ineffective-assistance claims are mixed questions of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We

review a trial court's findings of fact for clear error and review questions of law de novo. *Id.* Because defendant's motions were denied and no evidentiary hearing was held in the trial court, defendant's ineffective assistance of counsel argument is limited to review for errors apparent on the record. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018).

The Sixth Amendment of the United States Constitution guarantees the right to assistance of counsel for defense against criminal prosecutions. US Const, Am VI. The defendant bears the burden to prove that defense counsel did not provide effective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To prove counsel was ineffective, we rely on the test set out in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984):

> First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (citations omitted).]

We will not second-guess tactics of trial strategy, such as decisions concerning what evidence to present and which witnesses to call. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

1. HEARSAY

Defendant first argues that his trial counsel was ineffective for failing to object to repeated instances of hearsay. However, as previously discussed, none of the testimony that defendant cites constituted inadmissible hearsay. CM and GL did not offer any "statements" by KT, the detective's testimony was offered to explain his investigation, and Dr. Guertin's testimony fell under the MRE 803(4) exception to hearsay. Defendant's trial counsel was not ineffective for failing to raise futile objections to admissible testimony. *Ericksen*, 288 Mich App at 201.

2. EXAMINATION OF DR. GUERTIN

Defendant next argues that his trial counsel was ineffective for asking questions of Dr. Guertin on cross-examination that opened the door for Dr. Guertin to vouch for KT's credibility. As previously discussed, during cross-examination, defense counsel repeatedly asked Dr. Guertin if what he had in his report was what KT had told him. Defendant argues that his trial counsel's questioning was "sloppy" and gave Dr. Guertin multiple opportunities to state that he believed KT's account. However, defendant has not overcome "the strong presumption that counsel's assistance constituted sound trial strategy." *Armstrong*, 490 Mich at 289-290. Defense counsel initially tried to have Dr. Guertin admit that KT may have been unreliable by asking, "Are you saying that there may be things, in what you just testified that she told you, that may be incorrect?" When Dr. Guertin did not take the bait, defense counsel had to switch strategies. Defense counsel pushed Dr. Guertin to confirm that what he wrote in his report was based solely on what KT told him. Although Dr. Guertin stated that he took what she told him as true, defense counsel again

confirmed with Dr. Guertin that KT simply told him a story, he wrote it down, and that was all he knew at that point. Defense counsel's line of questioning sufficiently undermined the credibility of his testimony, because it highlighted that Dr. Guertin's conclusions were based solely on KT's report and were not confirmed by other evidence.

3. SUPPRESSION OF DEFENDANT'S POLICE INTERVIEW

Defendant next argues that his trial counsel was ineffective for failing to request a hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), to challenge the admissibility of his statements to the detective.

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (citations omitted).]

However, "[i]t is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances. *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013).

> When determining whether a defendant was in custody, courts consider both whether a reasonable person in the defendant's situation would believe that he or she was free to leave and whether the relevant environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. [*Id.* at 692.]

In this case, defendant was not entitled to a *Walker* hearing because he was not in a custodial interrogation. At the start of the interview, the detective made it clear that defendant was free to leave, and later on in the interview, confirmed with defendant that he was free to leave. Therefore, defendant clearly understood that he was not being held in custody. Defendant argues that his interview amounted to a custodial interrogation because the detective transported him to the police station and defendant was relying on police to take him home because of his intoxication. Although the detective offered to give defendant a ride because defendant told him that he had a few shots of tequila, defendant voluntarily accepted the ride and there is no indication that defendant was beholden to police to return home or that they would have refused to transport him if he decided to stop participating in the interview. Further, nothing precluded defendant from finding an alternative ride home, such as getting a ride from KT's mother, who also came to the police station for an interview. A reasonable person in defendant's position would have felt at liberty to end or leave the interview. Defendant was not in custody during his interview, *Cortez*, 299 Mich App at 691, so *Miranda* warnings were not required to make his statement voluntary, *Zahn*, 234 Mich App at 449. Therefore, defendant's trial counsel was not ineffective for failing to make a meritless request for a *Walker* hearing to suppress defendant's voluntary noncustodial statements to police. *Ericksen*, 288 Mich App at 201.

Even if defendant had been in custody and was entitled to a *Walker* hearing, defendant has not shown that his statement was involuntary. Defendant argues that his statement was involuntary because he was too intoxicated to drive. However, there was no indication that the amount of intoxicants he consumed impacted him to the extent that he was no longer capable of making free and voluntary decisions. In fact, defendant answered questions coherently throughout the interview and had no trouble understanding and arguing with the detective. Defendant also argues that police continued to question him despite his invocation of his right to counsel. At one point during the interview, defendant stated: "If you want to keep going down this line of questioning . . . then I think I'm gonna need a lawyer or something because this is, I believe this is—there's . . . way too much more being [sic] into this than—." However, because defendant was not subjected to a custodial interrogation, the detective was not obligated to honor a request for counsel. See *Bobby v Dixon*, 565 US 23, 28; 132 S Ct 26; 181 L Ed 2d 328 (2011) (holding that the defendant, who was not in custody when he asserted his right to counsel, could not invoke his *Miranda* rights anticipatorily or in a context other than a custodial interrogation). Regardless, defendant did not unequivocally invoke his right to counsel. Defendant simply mentioned that he might need a lawyer, then continued to answer questions. An ambiguous statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *People v Granderson*, 212 Mich App 673, 678; 538 NW2d 471 (1995).

4. KT'S INCONSISTENT TESTIMONY

Defendant next argues that his trial counsel was ineffective for failing to question KT and the CPS investigator about KT's inconsistent statements from the forensic interview. Defendant points to four inconsistencies that he argues should have been used to impeach KT. However, contrary to defendant's assertion that defense counsel failed to impeach KT, the record shows that in each instance, defense counsel specifically asked KT about the inconsistent statements on cross-examination. Defendant cannot argue that his trial counsel was ineffective for failing to do something that he actually did.

Defendant also argues that his trial counsel was ineffective for failing to call the CPS investigator as a witness so he could ask her about KT's inconsistent statements.[2] "[T]he failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009) (citation omitted). Trial counsel's decision not to call the investigator for further testimony was strategic because this would have opened the door for the investigator to offer KT's consistent statements. The statements that KT gave during her forensic interview were overwhelmingly consistent with her detailed account during her trial testimony, so if defendant had opened the door to this testimony, it would have only bolstered KT's credibility. Further, KT's prior statements were already used to impeach KT's testimony, and would have constituted hearsay if elicited from the investigator. Therefore, defendant has not rebutted the presumption that the decision not to call the CPS investigator as a witness was reasonable trial strategy. *Armstrong*, 490 Mich at 289-290.

5. FAILURE TO CALL FOURTH-GRADE TEACHER

Defendant next argues that his trial counsel was ineffective for failing to call KT's fourth-grade teacher as a witness. "[T]he failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *Seals*, 285 Mich App at 21 (citation omitted). In this case, CM testified that after KT disclosed the abuse to her, she reported it to her fourth-grade teacher and the three of them had a conversation in the hallway. Defendant argues that because the teacher apparently did not report the abuse despite being a mandatory reporter, he would have testified that CM never told him about the abuse, which would have impeached CM's testimony. However, defendant has made no offer of proof to support this assumption. There is no indication of what the teacher would have said or that it would have been beneficial to defendant. Even if he would have testified favorably to defendant, at most it would have discredited that small detail of CM's testimony. It would not have invalidated her testimony that KT disclosed the abuse to her at a young age. Therefore, defendant has not shown that but for this decision by counsel, a different result at trial would have been reasonably probable.

D. SENTENCING

Defendant argues that the trial court abused its discretion by imposing a sentence that was an upward departure from the minimum guidelines range. We disagree.

There are no special steps that a defendant must take to preserve the question whether the sentence was proportional. *People v Walden*, 319 Mich App 344, 350; 901 NW2d 142 (2017) (citations omitted). We review for reasonableness a trial court's upward departure from a

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[2] Although the CPS investigator testified, defendant did not introduce the inconsistent statements on cross-examination because the investigator did not testify about any of KT's statements. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination." MRE 611(c).

defendant's calculated guidelines range, *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015), and review for abuse of discretion the reasonableness of a sentence, *Walden*, 319 Mich App at 351. "A trial court abuses its discretion when it selects an outcome that was not in the range of reasonable and principled outcomes." *People v Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011).

Following our Supreme Court's holding in *Lockridge*, the sentencing guidelines are advisory only. *Lockridge*, 498 Mich at 399. The *Lockridge* Court also struck the "substantial and compelling reasons" test as the basis for departure from the guidelines and required that appellate courts review departure sentences for "reasonableness." *Id*. at 365. In *People v Steanhouse*, 500 Mich 453, 471-472; 902 NW2d 327 (2017), our Supreme Court clarified that the relevant question for appellate courts reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality. Under the principle of proportionality, " 'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *Id.* at 472, quoting *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). We have stated that factors that may be considered by a trial court under the proportionality standard include, but are not limited to:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*Walden*, 319 Mich App at 352-353 (quotation marks and citation omitted).]

Defendant argues that the trial court failed to sufficiently justify its 315-month departure because several of the reasons were already accounted for by the scoring guidelines. Defendant first argues that the trial court improperly justified its departure on the basis of the heinous nature of the crime involving CSC against a minor. At the sentencing hearing, the prosecutor argued that defendant's sentence should create a strong deterrent effect to warn people to not "go after little kids," and the trial court agreed that KT was "a little girl" who had been repeatedly "brutalized" by defendant. Defendant argues the heinous nature of the crime was accounted for by the enhanced minimum sentence for CSC-I involving a victim under 13. While the enhancement accounted for KT's age during the assaults, that was not the only aspect of the case that the trial court found heinous. KT was sexually abused for years by defendant, who came into her life just after her father died and was trusted by her mother. When KT found the courage to come forward, her mother abandoned her, released her parental rights, and married defendant. KT wanted to kill herself, went through multiple foster families, and was placed in a residential home. As the trial court stated, defendant's actions turned KT's life "into a living hell." Therefore, the trial court did not abuse its discretion by finding that the guidelines range did not account for the heinous nature of the offense.

Defendant next argues that the trial court improperly justified its departure on the basis that KT suffered psychological injury, which was accounted for in OV 4. In this case, OV 4 was scored at 10 points for "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). However, in this case, not only did KT suffer psychological trauma that required professional treatment, defendant's repeated abuse had extreme and long-lasting effects on KT.

Defendant's abuse drove KT to express suicidal ideations and engage in self-harm behaviors starting at the age of 13. She testified that she was prescribed a strong dose of medication, which helped somewhat, but made her feel suicidal when it wore off. Because of her trauma and behaviors, KT was placed in five different foster homes, and eventually moved to a residential home. KT explained that it was difficult for her to trust people or love herself, stated that she had terrible self-esteem and scars from cutting herself, and stated that she was not yet over it. As the prosecutor pointed out, KT had "been sentenced to a life sentence by this defendant," because she would never be the same person that she was before the abuse. Therefore, the trial court did not abuse its discretion by finding that the sentencing guidelines did not adequately account for the extent of KT's psychological trauma.

Defendant next argues that the trial court improperly justified its departure on the basis of testimony that the assaults happened on several occasions. Defendant argues that the number of offenses was contemplated by PRV 7, which was scored at 20 points for "2 or more subsequent or concurrent felony convictions," MCL 777.57(1)(a); OV 11, which was scored at 25 points because "one sexual penetration occurred," MCL 777.41(b); OV 12, which was scored at zero points because "[n]o contemporaneous felonious criminal acts were committed," MCL 77.42(1)(g); and OV 13, which was scored at 50 points because "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age," MCL 777.43(1)(a), and "the sentencing offense is first-degree criminal sexual conduct," MCL 777.43(2)(d). Although these variables accounted for the sexual conduct for which defendant was convicted, defendant was charged with only six offenses stemming from two specific incidents of abuse. KT testified regarding years of ongoing abuse that was not accounted for in the guidelines. KT testified that there were multiple incidents in which defendant made her shower with him, forced her to perform oral sex on him, he digitally penetrated her, kissed her, and tried to insert his penis in her. Therefore, the trial court did not abuse its discretion by finding that the guidelines range did not account for the extent of KT's abuse. Further, the guidelines range did not account for defendant's prior sexual conduct with his daughter. As the prosecutor stated, KV's testimony showed that defendant had repeatedly committed acts of criminal sexual conduct, so his sentence should reflect an attempt to protect society from such acts. Therefore, the trial court did not abuse its discretion by finding that the guidelines range did not account for defendant's repeated pattern of sexual conduct.

Defendant next argues that the trial court improperly justified its departure on the basis that defendant did not admit guilt. We have stated:

> A sentencing court may not base a sentence, even in part, on a defendant's failure to admit guilt, but a lack of remorse can be considered at sentencing. To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, we focus on three factors: (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. [*People v Carlson*, 332 Mich App 663, 675; 958 NW2d 278 (2020) (quotation marks and citations omitted).]

In this case, the prosecutor argued that defendant had taken no responsibility for his actions, so rehabilitation could not be a factor to consider, because defendant would not admit that he had a

problem for which to seek treatment. Although the trial court agreed with "reasons stated by [the prosecutor]" to depart from the guidelines range, it did not discuss the fact that defendant did not take responsibility for the charges. At no point did the trial court judge attempt to make defendant admit guilt, nor did he suggest that the fact that defendant maintained his innocence was part of the reason for the departure. Given that the trial court relied on other factors, such as the prolonged nature of the abuse and KT's psychological trauma, there is no indication that defendant's sentence would have been less severe if he had affirmatively admitted guilt. Further, the prosecutor noted that defendant's lack of remorse should be considered for the purpose of determining defendant's potential for rehabilitation, which is a proper factor for the trial court to consider when determining sentencing. *Walden*, 319 Mich App at 352-353.

Defendant argues that the departure sentence was not reasonable because the trial court did not consider defendant's age when imposing the sentence. With a 50-year minimum sentence, defendant will first be eligible for parole in 2068, when defendant is 103 years old. Defendant argues that this departure essentially sentenced him to life without parole, but had the trial court followed the guidelines range, defendant could have been released when he was 70 or 79 years old, which could be within his lifetime. However, defendant cites no authority that would compel a trial court to refrain from imposing a sentence departure simply because of a defendant's age. Regardless of defendant's age, the sentence was appropriate and proportional because the trial court took into account the seriousness of the offense, factors inadequately considered by the guidelines, factors not considered by the guidelines, and defendant's potential for rehabilitation to determine that the guidelines range was not appropriate. *Walden*, 319 Mich App at 352-353. Therefore, the trial court's departure from the guidelines range was well-supported, reasonable, and proportional to the seriousness of the offense.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford