STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 10, 2012
v	No. 297824 Saginaw Circuit Court
ANDE D. WOOLWORTH, Defendant-Appellant.	LC No. 09-03288-FC

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (person under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (person under 13 years of age). Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 20 to 40 years' imprisonment for the CSC-I conviction, and 10 years' to 270 months imprisonment for each CSC-II conviction. The trial court also ordered that defendant be subjected to lifetime electronic monitoring upon his release pursuant to MCL 750.520n. Defendant's sentences run concurrent to each other and he was given credit for 292 days served. For the reasons set forth in this opinion, we affirm defendant's convictions, vacate his sentence, and remand for resentencing.

I. FACTS

The victim, DC, began living with her mother and defendant, her stepfather, sometime in 2000 when she was approximately four years and six months old. DC testified that defendant touched her "in places I shouldn't have been touched" when she lived with him. DC explained that defendant would touch "in my vagina, on my vagina" both under and over her clothing. DC testified that she "had no clue" how many times defendant touched her, but she agreed when the prosecutor asked if defendant touched her on more than one occasion.

DC testified that the inappropriate touching preceded an incident where defendant "raped" her. DC stated that one day when her mother was not home, she fell asleep on defendant's bed while watching cartoons on television. DC explained that she was awakened to find defendant "raping" her. She stated that defendant hurt her when he "stuck his penis in my vagina." DC screamed for her stepsiblings who were in the living room below the bedroom. Both stepsiblings were very young at the time and when they appeared in defendant's bedroom,

defendant told them to go back downstairs; then, he stopped and did not say anything to DC. DC ran to her bedroom and got dressed then went to the bathroom and wiped herself and saw blood. DC agreed that the sexual assaults occurred when she was in first and second grade.

In 2009, when DC was about age 13, she told a friend about defendant's inappropriate sexual conduct. DC's friend in turn informed his mother, who then informed Charles Lesser, the principal at DC's school. Lesser testified that a parent contacted him and told him that she was "concerned about a girl in sixth grade." Lesser testified that the parent told him that "something" might have happened to the girl. Lesser testified that he had a conversation with DC and asked her whether anything had happened to her and told her "if an adult was inappropriately touching her or doing something to her that shouldn't be done, that she needs to let somebody know immediately." Lesser testified that DC became emotional and upset and he testified that "she said that everything that had happened had happened long in the past. I believe it was first or second grade, she said, that some inappropriate things had happened to her."

Dr. Henry Fredrick, D.O., testified that he examined DC in 2009 after she made a previous disclosure of sexual abuse. Fredrick testified as follows:

> The examination showed a healthy 13-year-old female who stated that her step-father had raped her. When I asked her what she meant by being raped, she stated that he put his wiener in her va-jj . . . and said that this had occurred when she was either six or seven years old. She stated that she was asleep and woke up and this was happening. She did have bleeding . . . afterwards and she had pain.

Fredrick testified that DC appeared healthy and that the physical examination was inconclusive.

At the start of the second day of trial, before jury selection resumed, the prosecutor provided defense counsel Susan Sells' curriculum vitae and informed counsel that Sells would testify as an expert in child sexual abuse. The prosecutor had included Sells on a witness list that he attached to the information and indicated that Sells would testify as a witness at trial; however, the prosecutor did not identify Sells as an expert. Defense counsel objected to the late notice. The trial court requested that the prosecutor make Sells available so that defense counsel could interview her and prepare for cross-examination. The prosecutor agreed, and also provided defense counsel with a transcript of Sells' testimony from an unrelated proceeding.

On the following day, defense counsel again objected to Sells' testimony and informed the court that he needed a couple of extra days to prepare to cross-examine Sells. The trial court indicated that defense counsel would have an opportunity to speak with Sells during an extended recess and overruled defense counsel's objection. Later that day, Sells testified as an expert in child sexual abuse. She offered testimony concerning delayed disclosure, grooming behavior, and a child's ability to comprehend sexual abuse. Sells did not treat DC and she did not offer testimony concerning the facts in the present case.

At trial, the prosecutor introduced four photographs that DC's father took sometime in 2005. One of the photographs depicted DC standing in defendant's home in her stepbrother's bedroom, and the other photograph depicted defendant's bedroom where the sexual penetration took place. The other two photographs depicted adult pornographic movies that were kept "out

in the open" in defendant's home where DC lived at the time. One of the photographs showed a rack of movies in defendant's home that was "nothing but pornography . . . mixed in with the other kids' movies. . . ." The other photograph depicted a close-up of a pornography movie where the title of the movie was visible. DC testified that there were times when she was in first and second grade that she saw defendant watching pornographic movies with her mother.

A jury convicted defendant as set forth above and he appeals as of right.

II. ANALYSIS

A. JUDICIAL BIAS

Defendant contends that the trial court breached the mantel of impartiality and denied him a fair trial when it questioned two witnesses. We review unpreserved claims of judicial bias for plain error affecting defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Under the plain error analysis, a defendant must show: 1) that an error occurred, 2) that the error was plain, i.e., clear or obvious, and 3) that the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

A criminal defendant is entitled to a "neutral and detached magistrate." *Jackson*, 292 Mich App at 597 (quotation omitted). However, a trial judge has broad discretion over matters of trial conduct and a defendant claiming judicial bias "must overcome a heavy presumption of judicial impartiality." *Id*. at 598 (quotation omitted). A court may participate in the questioning of witnesses in order to obtain more accurate and fuller testimony, to clarify points, and to draw out additional facts. *People v Smith*, 64 Mich App 263, 266-267; 235 NW2d 754 (1975). In questioning witnesses, a trial judge should avoid questions that may indicate partiality, or that could be considered intimidating, argumentative, or otherwise prejudicial to a party. *Id.* at 267. "If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed." *Jackson*, 292 Mich App at 598 (quotation omitted). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether [the] conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Id*. (quotations omitted).

Defendant contends that the trial court asked improper questions regarding Fredrick's medical findings and experience as a medical professional. At trial, after both parties finished questioning Fredrick, the trial court asked Fredrick whether his physical examination was "inconsistent with the history that this young girl gave." The court then asked Fredrick if he had examined "other five-year old little girls that have been sexually assaulted" and asked, "I think you gave us a number of 850 that you've compared altogether?"

We find that these questions were not improper. The trial court simply asked follow-up questions to clarify Fredrick's previous testimony. Moreover, the court's questions did not unduly influence the jury, as the court did not solicit any new information from Fredrick. Fredrick had already testified on direct examination that his medical evaluation was not dispositive as to whether DC was sexually abused. Prior to the trial court's question regarding

how many sexual abuse victims he had examined, Fredrick had already testified that he examined 850 child sexual abuse victims during the course of his career. Furthermore, the trial court instructed the jury that its comments and questions were not evidence and instructed the jury to disregard any perceived opinion on the part of the trial court. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (jurors are presumed to follow their instructions).

Defendant contends that the trial court elicited testimony that supported the prosecution's case when it asked Fredrick questions about the victim's hymen including whether "the fact that you've got . . . an intact hymen. That doesn't mean there wasn't an effort to penetrate?" Defendant also contends that the trial court improperly asked about delayed disclosure.

We find that the trial court did not commit any misconduct with respect to this line of questioning. Immediately before the court began asking questions, Fredrick testified that he examined the victim's hymen and agreed that it was "uninterrupted" or "intact." Fredrick explained that a hymen is present and "intact" upon a female's birth. Fredrick testified that, even if an examination revealed that a hymen was intact, such finding was not inconsistent with penetration because the hymen heals rapidly. Fredrick explained that his testimony was based on several medical studies performed by experts who examined female child sexual abuse victims "where there's been delayed disclosure."

In asking Fredrick follow-up questions about DC's hymen, and Fredrick's experience with delayed disclosure cases, the trial court did not unduly influence the jury and it did not assume the role of the prosecutor. *Jackson*, 292 Mich App at 598. The court did not solicit any new information and instead attempted to clarify Fredrick's earlier testimony. Although Fredrick's responses may not have been helpful to defendant's case, the court's questions were not inflammatory or designed to prejudice the defense. Simply because the testimony elicited by the trial court was damaging to defendant's cause is not sufficient to overcome the presumption of impartiality. See *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996) ("[a]s long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality . . . a trial court is free to ask questions of witnesses that assist in the search for truth"). Moreover, the trial court instructed the jury as noted above and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

Next, defendant contends that the trial court deprived him of a fair trial when it questioned Lesser and elicited hearsay testimony and led the witness to speculate that DC was having a traumatic flashback. At trial, before defense counsel cross-examined Lesser, the trial court asked Lesser whether DC went into any detail "as to what this occurrence was that she was teary-eyed about" and whether DC was reluctant to talk about "what was bringing her to tears." Lesser responded by repeating DC's out of court statement and by testifying that DC was "extremely reluctant" to talk about the incident because, in Lesser's opinion, DC "was sort of maybe having a flashback." The trial court overruled defense counsel's objection to Lesser's testimony concerning the flashback.

Having reviewed the record, we find that the trial court improperly questioned Lesser about DC's out of court statement because, as discussed *infra*, the statement amounted to inadmissible hearsay. The court essentially asked Lesser to repeat the hearsay testimony he offered on direct. Nevertheless, we find that the trial court did not pierce the veil of judicial

impartiality because defendant cannot show that the questions unduly influenced the jury. *Jackson*, 292 Mich App at 598. In this instance, the court did not elicit any new evidence because the jury previously heard the victim's out of court statement during Lesser's direct examination. And, as more fully discussed below, Lesser's testimony did not impact the outcome of the trial. Furthermore, as previously noted, the trial court instructed the jury that its questions and comments were not evidence and that the jury was not to infer that the trial court had an opinion on the case. See *Unger*, 278 Mich App at 235 (jurors are presumed to follow their instructions).

With respect to the trial court's question whether DC was reluctant to engage in conversation, we find nothing inappropriate about the question. The trial court simply asked a follow-up question to clarify Lesser's previous testimony and the trial court did not elicit any new evidence. Furthermore, non-verbal conduct is not hearsay and is admissible unless the person intends it to be an assertion. See MRE 801; *People v Gursky*, 486 Mich 596, 625; 786 NW2d 579 (2010). Here, there is no evidence to suggest that DC intended her emotional reaction and reluctance to speak with Lesser as an assertion. Accordingly, testimony about her nonassertive conduct was admissible. To the extent that defendant objects to Lesser's statement that he thought DC was having a "flashback," even if the court should have struck the response as speculative, the court's failure to do so did not amount to undue prejudice where a rational jury could have inferred on its own that DC was having a flashback. Finally, as noted above, the trial court provided jury instructions that cured any potential prejudice and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

B. EVIDENTIARY ISSUES

Defendant contends that the trial court committed several evidentiary errors that denied him his right to a fair trial. We review a trial court's determination as to the admissibility of evidence for an abuse of discretion. *Gursky*, 486 Mich at 606. However, the decision to admit evidence frequently "involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Questions of law are reviewed de novo. *Id*. A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*. at 279. To the extent that we conclude that the trial court committed evidentiary errors, a preserved claim of evidentiary error involves a nonconstitutional error that we review to determine if it is "more probable than not that the error in question was outcome determinative." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *Id*.

Defendant first contends that the trial court denied him a fair trial when it allowed Sells to testify as an expert where trial counsel did not have time to prepare for the testimony.

A prosecutor must attach to the information "a list of all witnesses known to the prosecuting attorney who might be called at trial. . . ." MCL 767.40a(1). Then, "[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(3). "[T]he purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence. . . ." *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998). However,

relative to expert witnesses, MCR 6.201(3) mandates that a party provide the information listed in that court rule. The prosecutor did not provide the additional information required by MCR 6.201(3) until after trial commenced. However, as more fully explained in footnote 1, we cannot find a basis for relief as defense counsel did not specifically request the information as required by MCR 6.201(A).

In this case, the trial court did not abuse its discretion in allowing Sells to testify as an expert because defendant had notice that Sells would testify. The prosecutor attached a witness list to the information *and* indicated on the list which witnesses he intended to call at trial. Sells' name was on the list and the prosecutor used an asterisk to indicate that she would testify at trial. The prosecutor filed the information on August 3, 2009; thus, defendant had nearly seven months to prepare for Sells' testimony. See *Gadomski*, 232 Mich App at 36 (purpose of listing requirement is to provide notice). And, although the prosecution did not identify Sells as an expert, MCL 767.40a; MCR 6.201(1),[1] Sells did not provide professional treatment for DC and she did not testify about the facts involved in the present case. Instead, Sells testified about general issues such as delayed disclosure and grooming behavior—issues that are common in child CSC cases. In addition, the trial court took measures to ensure that defendant would have time to contact Sells and review her CV and a transcript of her testimony from an unrelated trial.

Next, defendant contends that the trial court prejudiced the defense when it allowed the prosecution to introduce the four photographs into evidence. Defendant argues that the photographs should have been excluded because they were not relevant, were unfairly prejudicial, and because the prosecutor did not disclose the evidence until the third day of trial.

Evidence is relevant if it has "any tendency 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." MRE 401. "The threshold [of relevance] is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). Even where relevant, however, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Evidence is unfairly prejudicial when "there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. at 398.

In this case, the photographs were relevant and "of consequence to the determination" of defendant's guilt in that they affected the credibility of the victim, and the victim's credibility was directly at issue and of consequence to the determination of the case. See *People v Mills*,

[1] With respect to the prosecutor's duty to disclose the names of expert witnesses and the expert's CV under MCR 6.201(A), defense counsel did not expressly request the names of expert witnesses or the CVs of any expert in his pretrial demand for discovery. Hence, defendant is not entitled to relief on this basis. See MCR 6.201(A) (disclosure of specified items is only mandated "upon request"). However, MCR 6.201(3) plainly states that upon request, a party "**must** provide…"(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

450 Mich 61, 72; 537 NW2d 909 (1995) ("[i]f a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact"). Here, DC testified that defendant sexually assaulted her. Whether DC was credible, therefore, was "of consequence" to the jury's determination of defendant's guilt. *Id*. In particular, the photographs depicting DC at defendant's home and defendant's bedroom supported DC's testimony that she lived with defendant and tended to show her ability to remember details about her time there including the location where the assault took place. Thus, these photographs assisted the jury in determining DC's credibility. See *id*. Similarly, the photographs of the pornographic movies supported DC's testimony that she saw defendant watching pornography when she was in first and second grade. This, in turn, also assisted the jury in determining DC's credibility.

In addition to being relevant, the probative value of the photographs "was not substantially outweighed by the danger of unfair prejudice" because the photographs were not "marginally probative" and there was no danger that the jury gave them undue or preemptive weight. MRE 403; *Crawford*, 458 Mich at 398. Here, the photographs were not "marginally probative." Instead, they had significant probative value in that they assisted the trier of fact in determining the credibility of the victim, which in turn was critical to the jury's determination of whether defendant was guilty of the charged offenses. Furthermore, there was no danger that the jury gave the photographs undue or preemptive weight. DC gave detailed testimony about the assaults and defendant did not introduce any evidence to suggest that she had motive to fabricate her testimony. Moreover, the trial court instructed the jury that defendant was presumed innocent, that it was not to convict defendant because it believed he committed other "improper acts" or was guilty of "other bad conduct" or because it believed defendant was a "bad person". See *Unger*, 278 Mich App at 235.

Defendant also contends that the photographs were unduly prejudicial because the prosecutor did not disclose them until the third day of trial. The prosecutor informed defense counsel of the photographs on the third day of trial and explained that he had not learned of the photographs until the second day of trial when DC's father gave them to him.

MCR 6.201(A)(6) provides in relevant part that, upon request, a party must provide: "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any . . . *photograph* . . . with copies to be provided on request" (emphasis added). A prosecutor must comply with this rule within 21 days of a defendant's request for production. MCR 6.201(F).

In this case, in his pretrial demand for discovery, defense counsel requested a list of "all tangible objects and documents" within the prosecutor's control. However, at the time defendant submitted the request, there was no evidence presented to the trial court that the assistant prosecutor had knowledge or control of the photographs. Based on the record before us, we can only find evidence that the assistant prosecutor obtained the photographs during the second day of trial. Hence, since the assistant prosecutor did not know of the existence of the photographs until the date when he provided the photographs to defense counsel, we find good cause for the late disclosure. In addition, defense counsel had an opportunity to review the photographs before they were introduced to the jury and defendant does not indicate on appeal how trial counsel could have objected differently had he been given more time to review them. Further, the trial

court took precaution to limit the prejudicial impact of the photographs by instructing the jury as noted above. See *Unger*, 278 Mich App at 235.

Next, defendant contends that the trial court committed an "evidentiary error" when it allowed the prosecutor to refer to DC as "the victim." Defendant argues that the prosecutor's use of the phrase was unfairly prejudicial in that it appealed to the jury for sympathy and denied him the presumption of innocence. Defendant fails to cite to specific instances in the record where the prosecutor used the phrase "the victim;" therefore, we decline to consider defendant's argument. See *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008) ("[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position" (quotation omitted)). Nevertheless, having reviewed the record, we conclude that defendant's argument lacks merit. The prosecutor used the phrase on only a few isolated occasions. The prosecutor did not make any overt plea for sympathy, the phrase was not highly inflammatory, and the prosecutor did not attempt to shift the burden of proof. In addition, the trial court instructed the jury not to let sympathy influence its decision, that defendant was presumed innocent, and that the prosecutor had the burden of proof. See *Unger*, 278 Mich App at 235.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant raises several claims of ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id*.

In order to show that he was denied the effective assistance of counsel under either the state or federal constitution, a defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "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." *Carbin*, 463 Mich at 600.

Defendant contends that counsel rendered ineffective assistance when he waived opening statement. Counsel's decision to waive an opening statement "involves a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation omitted). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Unger*, 278 Mich App at 242-243.

In this case, trial counsel made a strategic decision to waive opening statement and we will not second-guess that decision on appeal. *Id*. At a post-trial *Ginther*[2] hearing, counsel

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

explained the reasoning behind his decision and indicated that he did not want to make promises to the jury that he was unable to fulfill during trial. The mere fact that counsel's strategy failed does not constitute deficient performance. *Petri*, 279 Mich App at 412.

Next, defendant contends that counsel rendered ineffective assistance when he failed to object to the hearsay testimony offered by Fredrick and Lesser.

As noted above, Fredrick testified that he performed a medical examination of DC because she had "made a previous disclosure of sexual abuse." Fredrick explained that his examination revealed "a healthy 13-year-old female who stated that her step-father had raped her." He elaborated that, "she stated that he put his wiener in her va-jj . . . and said that this occurred when she was either six or seven years old. She stated that she was asleep and woke up and this was happening. She did have bleeding when she wiped herself afterwards." During closing argument, the assistant prosecutor argued "so the testimony of Dr. Frederick is consistent with history that was provided by the patient, the victim in this case, [DC]." The assistant prosecutor noted that the history that DC gave to Fredrick "is consistent with what she's testified to here in this courtroom." "It's consistent with what she has always said during the course of the investigation" and that the statement was consistent with what DC told Lesser and the police.

Hearsay is 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 is inadmissible as substantive evidence unless it is properly offered under one of the exceptions to the hearsay rule. MRE 802. An exception to the hearsay rule exists for "[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).

In this case, Fredrick's testimony was not offered for a proper purpose under MRE 803(4). Fredrick did not explain at all how DC's statement was "reasonably necessary" to his diagnosis and treatment. Instead, he simply repeated the statement and then explained the results of his physical examination. The statement was not offered to articulate Fredrick's medical treatment and diagnosis or to show how Fredrick directed and structured his examination. Rather, the prosecutor offered the statement to bolster DC's credibility. Therefore, as offered, the statement amounted to inadmissible hearsay and defense counsel acted deficiently when he failed to object; however, for the reasons discussed below, defendant cannot show that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

With respect to Lesser, we also conclude that the witness offered improper hearsay testimony. Specifically, Lesser testified that a parent contacted him and told him that she was concerned about a girl in sixth grade, that "something" may have happened to the girl, and that Lesser should talk with the girl. Then, Lesser testified about DC's out of court statements. During rebuttal, the assistant prosecutor used the out of court statements to bolster DC's credibility when he argued that the statements were consistent with what DC told Fredrick, consistent with what she told police, and consistent with her trial testimony.

This aspect of Lesser's testimony amounted to hearsay. The assistant prosecutor did not offer the statements under any proper exception to the hearsay rule. Defense counsel should have immediately objected when Lesser offered the hearsay testimony given that this case turned on the credibility of the victim. By objecting, defense counsel could have alleviated any potential prejudice and his failure to do so fell below an objective standard of reasonableness. *Id*.

Nevertheless, our inquiry does not end by a finding that defense counsel's performance fell below an objective standard of reasonableness. Defendant must still show that there was a reasonable probability that, but for counsel's failure to object to Fredrick and Lesser's testimony, the result of the proceeding would have been different. *Id*. We cannot so conclude.

With respect to Lesser's testimony about the parent's out of court statement, the hearsay statement was not highly prejudicial in that the parent testified at trial that she spoke with Lesser and informed him about the alleged abuse. Lesser's testimony about the statement did not introduce any new information to the jury.

Similarly, Fredrick and Lesser's testimony about DC's out of court statements was not highly prejudicial. In *Gursky*, 486 Mich at 620-621, our Supreme Court considered the prejudicial impact of a child victim's hearsay statements and explained:

> In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant . . . *However, if the declarant himself testified at trial, any likelihood of prejudice was greatly diminished because the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements*. Where the declarant himself testifies and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial. [*Id*. (emphasis added) (quotations and citations omitted).]

The *Gursky* Court considered several factors in concluding that the child victim's hearsay statements in that case did not amount to prejudice warranting reversal. The Court noted that the hearsay did not "introduce anything new to the jury" because the prosecutor only used the evidence to show that the victim had not changed her story. *Id*. at 621-623. The hearsay was cumulative to the victim's testimony, the victim was subject to cross-examination, and the victim's testimony standing alone was sufficient to support the defendant's convictions. *Id*.

In this case, like in *Gursky*, the hearsay evidence was not highly prejudicial because it was offered to corroborate DC's trial testimony and to show that she had not changed her story. Importantly, DC testified at trial and was subject to cross-examination. Her testimony standing alone was sufficient to support defendant's convictions and the hearsay evidence did not introduce anything new to the jury. Furthermore, Lesser's testimony concerning DC's emotional reaction to his questions about sexual abuse was properly admitted as nonassertive conduct that strengthened DC's credibility. See *id*. at 624-625. In sum, on this record, we conclude that defendant cannot show that there is a reasonable probability that, but for defense counsel's failure to object to Fredrick and Lesser's hearsay testimony, the result of the proceeding would

have been different. *Carbin*, 463 Mich at 600. Accordingly, defendant is not entitled to relief on this issue.

Next, defendant contends that trial counsel "undermined" defendant when defendant moved the trial court to prohibit reference to the complainant as "the victim" and counsel stated that he was unaware of case law to support defendant's motion. Defendant fails to cite instances in the record where the prosecutor used the term "victim;" therefore we need not address this aspect of defendant's argument. See *Petri*, 279 Mich App at 412. Moreover, as noted above, the prosecutor's limited use of the phrase "the victim" did not unduly prejudice defendant and he cannot show that counsel's conduct in this regard impacted the proceeding. *Carbin*, 463 Mich at 600.

Next, defendant contends that defense counsel rendered ineffective assistance when he failed to effectively cross-examine Sells. At trial, defense counsel cross-examined Sells and asked her how many of her child clients had made false allegations; Sells responded and stated that she knew of only one of her 300 child clients that had made a false allegation. At the *Ginther* hearing, defense counsel agreed that he did not know the answer to the question before he asked it. Defense counsel also tried to formulate questions about external influences that may cause a child to lie, but the trial court repeatedly sustained objections to the questions.

In this case, although questioning a witness is a matter of trial strategy, *Petri*, 279 Mich App at 413, by his own statements to the trial court on the second day of trial and at the *Ginther* hearing, trial counsel was unprepared to cross-examine Sells. Accordingly, trial counsel's lack of preparation fell below an objective standard of reasonableness. This finding is underscored by the fact that Sells was listed by the prosecution in its initial witness list as one who would testify at trial. Trial counsel had access to the witness list nearly seven months before trial. However, trial counsel seemed surprised to learn after commencement of the proceedings that Sells was not a fact witness but rather an expert witness. Such "surprise" by trial counsel clearly reveals that he had not interviewed or sought to contact Sells in any manner to discuss her potential testimony prior to trial. Accordingly, trial counsel's lack of preparation as to this witness fell below an objective standard of reasonableness and amounted to deficient performance. *Carbin*, 463 Mich at 599-600.

Nevertheless, even with this finding, defendant cannot show that there is a reasonable probability that, but for counsel's deficient performance in preparing to cross-examine Sells, the result of the proceeding would have been different. *Id*. at 600. Here, although Sells' testified that she was aware of only one of her child clients that made false allegations, DC was not one of Sells' clients and Sells did not offer testimony about the facts in the present case. Moreover, defendant does not articulate how counsel should have cross-examined Sells differently or provide examples of questions that counsel should have asked Sells. Further, even if counsel had elicited testimony from Sells that outside influences can cause children to lie, defendant fails to show how such influences were present in this case. Defendant is not entitled to relief on this issue. Finally, defendant contends that trial counsel rendered ineffective assistance when he failed to cross-examine Lesser about his failure to report DC's allegations to Child Protective Services (CPS). However, our review of the trial record reveals that defense counsel did question Lesser about whether he contacted CPS. Accordingly, defendant's argument is without merit.

D. PROSECUTORIAL MISCONDUCT

Next, defendant contends that the prosecutor committed several acts of misconduct. Defendant failed to preserve this issue for review because he did not raise contemporaneous objections to the alleged instances of prosecutorial misconduct. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

"Generally, a claim of prosecutorial misconduct is a constitutional issue, that is reviewed de novo, but a trial court's factual findings are reviewed for clear error." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Unpreserved instances of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *Id*.

Defendant first contends that the assistant prosecutor committed misconduct when he elicited hearsay testimony from Fredrick and Lesser; however, defendant fails to cite any legal basis that would support such a conclusion. In the absence of clear legal precedent, we are unable to conclude that the prosecutor committed misconduct by eliciting the testimony. The testimony was not offered contrary to a court ruling or following an objection by trial counsel. Additionally, we note that: "[t]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id*. Hence, even if we could conclude that the prosecutor acted improperly in eliciting hearsay testimony, as discussed above, such testimony did not affect the outcome of the proceeding. Hence, we find that the assistant prosecutor's elicitation of the testimony was not misconduct such that it denied him a fair and impartial trial. *Id*.

Next, defendant contends that the prosecutor committed misconduct when, during closing argument, he stated that DC observed defendant having sex with her mother. Defendant maintains that there was no evidence introduced at trial to support this statement.

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence. . . ." *People v Parker*, 288 Mich App 500, 510; 795 NW2d 596 (2010), (quotation omitted). In this case, DC did not testify that she saw defendant unclothed and having sex with her mother. Hence, the assistant prosecutor acted improperly when he stated otherwise to the jury. Nevertheless, the prosecutor's statement did not deny defendant a fair and impartial trial. *Brown*, 279 Mich App at 134. Here, the statement was isolated and the trial court instructed the jury that the attorneys' statements were not evidence. As previously noted, jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

E. CUMULATIVE EFFECT

Next, defendant contends that the cumulative effect of the errors in this case served to deny him his right to a fair trial. We review a cumulative error argument to determine whether the combined effect of several minor errors resulted in serious prejudice. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *Id*. The effect of the errors must have been "seriously prejudicial" in order to warrant reversal. *Id*. "[O]nly actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

As discussed in detail above, there were several errors in this case: (1) the trial court improperly questioned Lesser about DC's hearsay statement and failed to strike a speculative response; (2) trial counsel acted deficiently when he failed to object to Fredrick and Lesser's hearsay testimony; (3) trial counsel acted deficiently when he failed to adequately prepare for the testimony of prosecution witness Sells; (4) the assistant prosecutor committed misconduct when he referenced facts outside the evidence.

These errors viewed cumulatively, were not "seriously prejudicial." *Knapp*, 244 Mich App at 387-388. Two of the errors concern hearsay testimony about DC's out of court statements and the out of court statement made by a parent from her school, i.e. (1) and (2). As discussed above, the hearsay was not highly prejudicial. The parent's out of court statement was not highly prejudicial in that it did not introduce new information to the jury. DC's out of court statement was not highly prejudicial; she testified and was subject to cross-examination at trial, and the hearsay did not introduce anything new to the jury. And, evidence of DC's emotional reaction to Lesser's questions was admissible as non-assertive conduct that strengthened DC's credibility. With respect to the trial court's failure to strike Lesser's speculation that DC was having a "flashback," any error was harmless where the jury could have inferred that DC was having a flashback.

With respect to the remaining two errors, i.e. (3) trial counsel's failure to prepare for Sells' testimony, and (4) the assistant prosecutor's reference to facts outside the evidence, these errors even when combined with the other errors in this case, were not highly-prejudicial. Although trial counsel's preparation for Sells' testimony amounted to deficient performance, the victim was not a client of Sells and she did not testify about the facts in the present case. Moreover, defendant fails to articulate what defense counsel should have done differently during his cross-examination. In addition, the assistant prosecutor's improper statement during closing argument was isolated and the trial court instructed the jurors that statements of the attorneys were not evidence. Finally, while there were several errors in this case, a criminal defendant is not entitled to a perfect trial "for there are no perfect trials." *People v Miller*, 482 Mich 540, 559-560; 759 NW2d 850 (2008) (quotation omitted).

F. SENTENCING

Next, defendant contends that the trial court erred when it sentenced him as a habitual offender and erred when it scored prior record variable (PRV) 5 (prior misdemeanor convictions), at 15 points. Defendant also contends that Michigan's sentencing scheme is unconstitutional and that the trial court's imposition of lifetime electronic monitoring violated the Ex Post Facto Clause of the state and federal constitution. Defendant preserved his sentencing arguments for review when he raised them in a motion for resentencing in the trial court and the trial court addressed and denied defendant's motion. See *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Defendant failed to preserve his constitutional argument for review because he did not object on the same basis in the trial court. *Id.*

"This Court reviews a trial court's decision to impose an increased sentence pursuant to the habitual offender act for an abuse of discretion." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). However, we review a trial court's findings of fact at sentencing for clear error. *Id.* "Clear error exists where the reviewing court is left with a definite and firm

conviction that a mistake has been made." *People v Callon*, 256 Mich App 312, 321; 662 NW2d 501 (2003). With respect to scoring of the guideline variables, "[t]his Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). To the extent we must construe or apply the statutory sentencing guidelines, such issues present questions of law that we review de novo. *Mack*, 265 Mich App at 125. With regard to defendant's ex post facto challenge, we review constitutional issues de novo. *Callon*, 256 Mich App at 315. An unpreserved constitutional issue is reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763, 774.

On appeal, defendant contends that the trial court erred when it sentenced him as a habitual offender, second offense, because the prosecutor failed to meet his burden to prove that the offenses in this case occurred after his prior felony conviction on January 14, 2003.

MCL 769.10 directs a trial court to sentence a defendant who has been convicted of a felony and that person commits a "subsequent felony within this state." "[T]he convictions on the prior offenses must precede the commission of the supplemented offense" in order for the conviction to be used for enhancement. *People v Sanders*, 91 Mich App 737, 744; 283 NW2d 841 (1979). A prosecutor has the burden to prove the validity of a prior conviction by a preponderance of the evidence. MCL 769.13(5)-(6). The preponderance of evidence standard means that "the evidence must persuade the fact-finder that it is more likely than not that the proposition is true." *Miller-Davis Co v Ahrens Constr, Inc. (On Remand)*, ___ Mich App___; ___ NW2d ___ (2012) (Docket No. 284037, issued March 22, 2012) (Slip op. at 8).

In this case, defendant was convicted of a felony on January 14, 2003. At trial, DC testified that she was born on February 2, 1996. Evidence showed that DC went to live with defendant when she was approximately four years' and six months old sometime in 2000. She moved out sometime in 2006. DC agreed with the prosecutor that she was sexually assaulted when she was in first and second grade. Fredrick testified that DC informed him that defendant sexually assaulted her when she was six or seven years old. On this record, we are not left with a "definite and firm conviction" that the trial court erred when it determined that defendant committed at least one of the underlying offenses after January 14, 2003. DC was age seven on February 1, 2003. Fredrick testified that DC informed him that defendant sexually assaulted her when she was age "six or seven." DC agreed that she was sexually assaulted in "first *and* second" grade. Based on this record, we hold that the trial court did not clearly err when it determined there was evidence to support that defendant committed one of the underlying offenses after January 14, 2003 under the preponderance of the evidence standard.

Next, defendant contends that the trial court erred when it scored PRV 5 at 15 points. MCL 777.55 governs the scoring of PRV 5, and, in relevant part, directs the trial court to score 15 points if the offender has five or six prior misdemeanor convictions. MCL 777.55(1)(b). The statute further directs the court to only count misdemeanors that involve offenses against a person, or property, or controlled substance or weapons offenses, or offenses involving the operation of a vehicle under the influence of intoxicants. MCL 777.55(2)(a) (b).

Defendant had five prior misdemeanors that the trial court considered for purposes of scoring PRV 5. One of those misdemeanors included a 1993 California misdemeanor for providing a false identification to a peace officer. Defendant argues that the trial court erred in considering the California misdemeanor because that misdemeanor was not an offense against a person or property and was not a weapons or controlled substance offense and did not involve an offense for operating a vehicle while intoxicated. Hence, pursuant to MCL 777.55(1)(b), it cannot be used to score PRV 5.

Cal Pen Code § 148.9 proscribes providing false identification to a peace officer; the offense is part of Chapter 7 of Title 7 of the California Penal Code, which concerns "Crimes Against Public Justice." Therefore, defendant's 1993 misdemeanor conviction in California for providing false identification to a peace officer is a crime against public justice. It is not an offense against a person or property; it is not a weapons offense or a controlled substance offense and it is not an offense for operating a vehicle under the influence of intoxicants. Accordingly, the misdemeanor should not have been considered for purposes of scoring PRV 5. MCL 777.55(2)(a) (b).

Not counting the California misdemeanor, defendant had four prior misdemeanors that should have been considered for purposes of scoring PRV 5. Where a defendant has four qualifying prior misdemeanors, a trial court must score PRV 5 at 10 points. MCL 777.55(1)(c). Rescoring PRV 5 at 10 points in this case reduces defendant's total PRV score from 50 to 45 points, and drops defendant's PRV level from "E" to "D". See MCL 777.62 (Class A felony grid[3]). The minimum sentencing guidelines range for habitual offenders, second offense, falling in cell D-III on the Class A felony grid is 108 to 225 months imprisonment. MCL 777.62 (grid); MCL 777.21(3)(a) (habitual status). Here, the trial court sentenced defendant to a minimum of 20 years' (i.e. 240 months) imprisonment for the CSC-I offense. This minimum sentence fell outside the appropriate guidelines range; therefore we vacate defendant's sentence and remand for resentencing. See *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006) (a defendant is entitled to resentencing on the basis of a scoring error if the error alters the recommended minimum sentence range under the legislative guidelines).

Next, defendant contends that Michigan's sentencing scheme is unconstitutional in that it allows a trial court to increase his sentence based on evidence not proven beyond a reasonable doubt; defendant argues that the prosecutor should have had to prove offense variable (OV) 4 (psychological injury), beyond a reasonable doubt. Defendant cites *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) in support of his argument. Defendant's argument lacks merit. See *People v Drohan*, 475 Mich 140, 159-162, 164; 715 NW2d 778 (2006) (holding that *Blakely* does not affect Michigan's sentencing scheme); *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) ("A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence").

Finally, defendant contends that the trial court's imposition of lifetime electronic monitoring violated the Ex Post Facto Clause of the state and federal constitution. MCL

[3] CSC-I, the sentencing offense, is a Class A offense. MCL 777.16y.

750.520b proscribes CSC-I and, in addition to imprisonment, the statute requires the trial court to sentence a defendant to lifetime electronic monitoring pursuant to MCL 750.520n.[4] MCL 750.520b(2)(d). MCL 750.520c proscribes CSC-II and it provides that, in addition to imprisonment, for offenses involving sexual contact committed by an individual 17 years of age or older against a victim less than 13 years of age, a trial court must sentence the defendant to lifetime electronic monitoring pursuant to MCL 750.520n. MCL 750.520c(2)(b).

Effective August 28, 2006, the Legislature amended both statutes to add the lifetime electronic monitoring provisions and added MCL 750.520n to the Penal Code. 2006 PA 169 (amending MCL 750.520b); 2006 PA 171 (amending MCL 750.520c and adding MCL 750.520n); *People v Kern*, 288 Mich App 513, 517, 517 n 1; 794 NW2d 362 (2010). Defendant maintains that sentencing him to lifetime electronic monitoring violates the Ex Post Facto Clause in that the provisions constitute greater punishment than the law imposed before 2006 when he committed the underlying offenses.

Both the Michigan and federal constitution prohibit ex post facto laws. *Callon*, 256 Mich App at 316, citing Const 1963 art 1, § 10; US Const, art I, § 10. The Michigan provision is no more expansive than the federal provision and both clauses "are designed to secure substantial personal rights against arbitrary and oppressive legislation . . . and to ensure fair notice that conduct is criminal." *Id.* (citations omitted). The United States Supreme Court articulated the four categories of ex post facto laws as follows:

> "'1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*.'" [*Id*., quoting *Carmell v Texas*, 529 US 513; 519-520; 120 S Ct 1620; 146 L Ed 2d 577 (2000); quoting *Calder v Bull*, 3 US 386, 390; L Ed 648 (1798) (emphasis in original).]

The issue in this case is whether the lifetime electronic monitoring provisions constitute a greater punishment than the law imposed at the time defendant committed the crimes sometime before 2004. If so, then sentencing defendant to lifetime electronic monitoring violates the Ex Post Facto Clause of the state and federal constitution. *Id*.

In *People v Cole*, ___ Mich ___; ___ NW2d ___ (2012), (Docket No. 143046, issued May 25, 2012), is a case that involved a defendant's due process rights during a plea hearing, our Supreme Court held that lifetime electronic monitoring constitutes "additional punishment" that

[4] MCL 750.520n(1) provides in relevant part: "[a] person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring. . . ."

is part of a criminal defendant's sentence. Slip op. at 6 n 5, 9-11. The Court explained "a plain reading of the relevant statutory text compels our conclusion that the Legislature intended mandatory lifetime electronic monitoring *to be an additional punishment and part of the sentence itself* when required by the CSC-I or CSC-II statutes." *Id*. at 11 (emphasis added).

In this case, sentencing defendant to lifetime electronic monitoring violated the Ex Post Facto Clause because it amounted to greater punishment than the law annexed to CSC-I and CSC-II at the time defendant committed the underlying offenses sometime before 2004. *Callon*, 256 Mich App at 316; *Calder*, 3 US at 390. As our Supreme Court explained in *Cole*, lifetime electronic monitoring amounts to punishment that is part of a criminal defendant's sentence following a conviction of CSC-I or CSC-II. *Cole*, ___ Mich at ___ (Slip op. at 9-11). This constitutes greater punishment than the law imposed when defendant committed the offenses. Specifically, before 2006, the maximum penalty defendant could have faced for a CSC-I conviction was "life or any term of years" and the maximum for a CSC-II conviction was 15 years' imprisonment. See MCL 750.520b(2); MCL 750.520c(2). Now, under the revised statutes, defendant not only must serve his prison sentences, but he also faces continued punishment upon his release or parole, "punishment, which [] entails having to wear a device and be electronically tracked" from the time of his release until the date of his death. *Cole*, ___ Mich at ___ (Slip op. at 12). As such, application of the revised statute to defendant violates the Ex Post Facto Clause. *Callon*, 256 Mich App at 316; *Calder*, 3 US at 390. Accordingly, that aspect of defendant's sentence must be vacated because it amounted to plain constitutional error that affected defendant's substantial rights in that it affected the severity of his sentence. *Carines*, 460 Mich at 763-764.

In sum, the trial court did not abuse its discretion when it sentenced defendant as a habitual offender and Michigan's sentencing scheme is not unconstitutional under *Blakely*, 542 US at 296; however, defendant is entitled to resentencing because the trial court erred in scoring PRV 5 and because the imposition of mandatory lifetime electronic monitoring violates the Ex Post Facto Clause of the state and federal constitution.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello