STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2012
v	No. 304650 Wayne Circuit Court
DENNIS KENDALL MALONE, Defendant-Appellant.	LC No. 10-007879-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 304651 Wayne Circuit Court
DENNIS KENDALL MALONE, Defendant-Appellant.	LC No. 10-007880-FC

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

In Docket No. 304650, defendant appeals as of right his jury trial convictions for three counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (person 13 to 15 years old), failure to register as a sex offender, MCL 28.729(1)(a), delivery of marijuana to a minor, MCL 333.7401(2)(c); MCL 333.7410(1), felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to 320 months' to 60 years' imprisonment for each third-degree CSC conviction, 58 months' to 15 years' imprisonment for the failure to register as a sex offender conviction, 48 months' to 10 years' imprisonment for the delivery of marijuana to a minor conviction, 58 months' to 15 years' imprisonment for the felon in possession of a firearm conviction, two years' imprisonment for the felony-firearm conviction, and credit for time served for the possession of marijuana conviction.

In Docket No. 304651, defendant appeals as of right his jury trial convictions for four counts of first-degree CSC, MCL 750.520b(1)(a); MCL 750.520b(2)(c) (person under 13, defendant 17 years of age or older), second-degree CSC, MCL 750.520c(1)(a) (person under 13 years old), and delivery of marijuana to a minor, MCL 333.7401(2)(c); MCL 333.7410(1). Defendant was sentenced to life imprisonment without parole for each first-degree CSC conviction, 228 months' to 40 years' imprisonment for the second-degree CSC, and 48 months' to 10 years' imprisonment for the delivery of marijuana to a minor. We affirm in both appeals.

In this case, defendant was accused of raping two underage girls. T.M.'s undergarments were tested to determine the source of DNA from semen found in the undergarments. Defendant's DNA was a positive match for the semen found in the undergarments. Additionally, two other sources of semen were discovered in T.M.'s undergarments. Defendant contends that the trial court erred when it excluded evidence that a DNA sample taken from T.M.'s undergarments showed that, in addition to defendant, other, unidentified, sources of semen were discovered.

A party who proffers evidence that the trial court excludes must make an offer of proof to preserve the issue of admissibility of the evidence on appeal. MRE 103(a)(2); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). An offer of proof means that "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." MRE 103(a)(2). Additionally, a party must state *specific purposes* for the admission of the evidence; otherwise, the issues "are not properly preserved for our review." *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984).

After the prosecution explained to the trial court that the entire report was not "relevant and not unduly prejudicial in violation of [the] rape shield [law]," defense counsel gave a general explanation for why the entire report should be admitted: "[M]y concern is hearing the totality of the whole report, Judge." The trial judge ruled on the admissibility of the entire DNA report and found that it was not relevant and would only be prejudicial to T.M.

On appeal, defendant claims that the trial court's decision to preclude the entire report deprived defendant of his right to a fair trial, his right to confront witnesses against him, and his right to present a defense.[1] Defendant never specifically proffered the full report for the purpose of preserving defendant's right to a fair trial, to confront witnesses against him, or to present a defense. Thus, defendant did not preserve these issues for appeal.

[1] Defendant also discusses throughout his brief on appeal that he did not have the chance to question the DNA analyst on the validity and credibility of the DNA testing performed on T.M.'s undergarments, because he could not discuss the other sources of semen found on T.M.'s undergarments. Therefore, defendant claims he was denied the right to confront witnesses against him, to prepare and present a defense, and to have a fair trial. However, defendant never objected to the introduction of the DNA test results from T.M.'s undergarments because of the chance that the testing was inaccurate.

This Court reviews "unpreserved evidentiary error, including alleged constitutional error, for plain error." *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

> First, there must be an error; second, the error must be plain (i.e., clear or obvious); and third, the error must affect substantial rights (i.e., there must be a showing that the error was outcome determinative. Moreover, reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of guilt or innocence. [*Coy*, 258 Mich App at 12 (citations omitted).]

The trial court did not commit plain error when it denied the admission of the entire report because, pursuant to the rape shield law, MCL 750.520j(1), the evidence of additional donors of sperm found in T.M.'s undergarments was irrelevant and would have been so prejudicial that it far outweighed any probative value.

Both the United States and Michigan Constitutions provide that the accused has the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 524-525; 802 NW2d 552 (2011). However, "[t]he right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant *issues*. It may[, however,] bow to accommodate other legitimate interests in the criminal trial process[.]" *Hackett*, 421 Mich at 344, quoting *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). (Emphasis in the original.)

In order to be admissible, evidence must be relevant. MRE 402. Pursuant to MRE 401, relevant evidence "means evidence having 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." Relevant evidence, however, is not *always* admissible. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403.

The rape shield law, MCL 750.520j(1), was designed to exclude irrelevant "evidence of the victim's sexual conduct with persons other than defendant" from being admitted at trial. *Arenda*, 416 Mich at 10. Furthermore, "inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury." *Id.* However, on occasion "such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Adair*, 452 Mich 473, 484; 550 NW2d 505 (1996), quoting *Hackett*, 421 Mich at 348.

MCL 750.520j(1), provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct *shall not be admitted* under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material

> to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [Emphasis added.]

As highlighted above, evidence of specific instances of sexual activity revealing the source or origin of semen is admissible "only to the extent that the judge finds that the . . . proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value . . . ." *Adair*, 452 Mich at 485, quoting MCL 750.520j. (Emphasis deleted.) In fact:

> The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation. [*Adair*, 452 Mich at 485, quoting *Hackett*, 421 Mich at 349.]

The DNA Analyst's report revealed that DNA taken from T.M.'s underwear was a "mixture of DNA types from" T.M. and "at least three additional donors," and that defendant's DNA was found on T.M.'s undergarments. The trial court ruled that the entire report could not be admitted at trial. Although the trial court did not explicitly state that it was applying the statute, it did state:

> I could see [admitting the entire report] if there was not any potential evidence regarding [defendant]. But there is, and that's what this trial is about. I don't see it as being relevant to any other potential person, other than maybe to show that [T.M.] may be a bad girl. And I don't think that that's relevant here. So I think you should just stick to what's relevant in this case. And . . . this case is regarding [defendant] and not anyone else.

The trial court correctly applied MCL 750.520j and excluded evidence regarding T.M.'s sexual conduct with persons other than defendant. Thus, the trial court did not admit evidence of T.M.'s other sexual partners who also left their DNA behind in her undergarments, as evidence of other semen in T.M.'s undergarments was not material to any fact in question. The presence of additional semen, other than defendant's, only proves that more than one person sexually abused T.M., and had no probative value to the issues in this case. And even if the evidence of additional donors was relevant, the introduction of this evidence would have been so prejudicial that it would have outweighed any probative value in introducing the entire report. The fact that sperm from other men was found in T.M.'s undergarments did not negate the fact that

defendant's sperm was found in T.M.'s undergarments. Thus, the trial court did not commit plain error when it excluded evidence of T.M.'s other sexual partners.[2]

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray

[2]Defendant never addresses in the body of his brief his argument that he was denied the right to a fair trial, as it is only contained in defendant's statement of the issue. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant abandoned this argument on appeal.