STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2013
v	No. 308510 Wayne Circuit Court
TOMMY BROWN, Defendant-Appellant.	LC No. 11-001735-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

A jury found defendant guilty of seven counts of first-degree criminal sexual conduct (relationship with a victim between 13 and 16 years old), MCL 750.520b(1)(b)(*ii*), and one count of distributing sexually explicit matter to minors, MCL 722.675(1). Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to consecutive terms of 40 to 60 years in prison for each first-degree criminal sexual conduct conviction and to a concurrent 5-to-15-year term for the remaining conviction. We affirm defendant's convictions and sentences but remand for the limited purpose of correcting a clerical mistake in defendant's presentence investigation report.

DEFENDANT'S PRIMARY BRIEF ON APPEAL

In the brief filed by defendant's appellate counsel, defendant first argues that the trial court abused its discretion by admitting other-acts evidence because it failed to conduct an MRE 403 balancing analysis in connection with the admission of the evidence under MCL 768.27a. Because defendant failed to raise this specific basis for objection below, this claim is unpreserved. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001) ("[t]o preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal"). We review unpreserved claims for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).[1]

[1] In general, this Court reviews a trial court's decision to admit other-acts evidence for an abuse of discretion, which occurs when the court chooses an outcome that is outside the range of

The record fails to explicitly indicate that the trial court conducted an MRE 403 balancing analysis in connection with the admission of the other-acts evidence under MCL 768.27a. See *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012) ("evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403"). However, the trial court's possible error was harmless if, in fact, MRE 403 did not require the exclusion of the evidence. See *id*. at 491 (affirming this Court's holding that the failure to conduct an MRE 403 analysis was harmless). MRE 403 mandates the exclusion of otherwise-admissible evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." 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." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Recently, the Michigan Supreme Court identified a nonexhaustive list of relevant factors that a court should consider in determining whether evidence admitted under MCL 768.27a is unfairly prejudicial:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Watkins*, 491 Mich at 487-488.]

The propensity inference, typically forbidden under MRE 404(b), is to be weighed on the probative side of the equation under MCL 768.27a. See *id*. at 487 ("when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect").

We find that MRE 403 did not require exclusion of the other-acts evidence. The prior bad acts shared several significant similarities with the charged offenses of first-degree criminal sexual conduct. In both the prior case and the current case, defendant targeted a young girl in her early- to mid-teens and tended to perpetrate the crimes in the middle of the night. In both cases, he was an authority figure to the victim and exercised a certain amount of control over the victim. Also, the previous victim's account of defendant's frequent and prolonged sexual assaults parallel the testimony by the current victim, JS, of repeated sexual assaults. Given the striking similarities, the other-acts evidence was highly probative of defendant's guilt of the charged offenses. Although defendant was never charged for the prior bad acts and the previous victim waited nearly 10 years to testify against defendant, the evidence was reasonably necessary to bolster JS's credibility and rebut defendant's theory of the case. According to defendant's theory, JS, who was already a troubled teenager, was angry with defendant for disciplining her and fabricated the allegations of sexual abuse. Evidence that defendant had a propensity to commit criminal sexual conduct under circumstances similar to the charged offense assisted the jury in determining which of the two competing theories was more credible.

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reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

On the basis of the foregoing, we find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Because MRE 403 did not require the exclusion of the evidence, reversal is unwarranted.

Defendant next argues that the prosecution presented insufficient evidence to support his convictions. We review defendant's challenge to the sufficiency of the evidence de novo, examining the evidence in the light most favorable to the prosecution and resolving all evidentiary conflicts in its favor, to determine whether a rational trier of fact could have found that the elements of the crimes were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). Determination of witness credibility is the sole province of the jury, not this Court. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

Defendant does not focus on any particular element of the crimes charged, but merely contends that JS's testimony was incredible because it differed from what she told Julie Goddard-Lyons, the forensic nurse who examined her shortly after the incidents, and because JS had a motive to fabricate the allegations. The jury was well aware of any inconsistencies in JS's versions of events and her possible motive for fabrication, and evidently it found JS credible. This Court will not interfere with that determination, *id*., and JS's testimony supported the convictions. Defendant's specific argument that the prosecution failed to present any evidence that he showed JS a sexually explicit book is contradicted by JS's testimony at trial. JS testified, "[Defendant] just showed me the cover of the book. It just said, 'Tickle his Pickle,' in red. . . . He said, this was about learning how to do things the way a man wants you to do it, as far as sexual." This testimony was sufficient to establish that defendant "disseminated" sexually explicit matter to a minor, as it is defined by statute. See MCL 722.671(b) (defining "[d]isseminate," as "to . . . exhibit [or] show . . ."); see also *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) ("[c]ircumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime").

The final argument in defendant's primary brief on appeal is that his seven consecutive sentences for first-degree criminal sexual conduct are disproportionate and constitute cruel or unusual punishment. We disagree. Because defendant failed to raise this issue below, we review this claim for plain error that affected substantial rights. *Carines*, 460 Mich at 763-764.

Defendant argues that his sentences are disproportionate because the trial court failed to state substantial and compelling reasons for imposing consecutive sentences. This argument finds no support in the text of the statute that authorized defendant's consecutive sentences. MCL 750.520b(3) provides, "The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." There is no language in the statute that requires the court to state substantial and compelling reasons for imposing consecutive sentences. When statutory language is unambiguous, further judicial construction is neither required nor permitted. See *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

Moreover, the premise of defendant's argument is faulty. Defendant argues that, even if each individual sentence is proportionate, when imposed consecutively without substantial and compelling reasons, his sentences become disproportionate. This Court has previously rejected a

similar argument. See *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991). Each sentence is to be reviewed individually. *Id*.; see also *People v Hardy*, 212 Mich App 318, 320; 537 NW2d 267 (1995). Defendant does not argue that his individual sentences fall outside the proper sentencing guidelines range or are otherwise disproportionate. Therefore, we hold that defendant's sentences are not disproportionate. Because a sentence that is proportionate is not cruel or unusual punishment, see *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008), defendant's cruel-or-unusual-punishment argument fails as well.

DEFENDANT'S "STANDARD 4" BRIEF

Defendant filed a brief under Administrative Order No. 2004-6, Standard 4, which allows a criminal defendant to present additional claims of error not submitted by appellate counsel. With the exception of defendant's claim of clerical error in his presentence investigation report, the claims presented in defendant's Standard 4 brief do not merit reversal or remand.

Defendant first argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this claim is unpreserved. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Our review of unpreserved ineffective-assistance claims is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, a defendant must show "that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). There is a strong presumption that defense counsel rendered effective assistance. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

The first contention in defendant's multi-faceted ineffective-assistance claim involves defense counsel's failure to subpoena witnesses to testify on his behalf. Defendant fails to specify the names of witnesses, above and beyond the three who testified on his behalf at trial, whom he wished to have testify at trial. Insofar as defendant's sparse argument could be construed as a challenge to defense counsel's failure to subpoena Kimley Young, defendant waived this argument because he expressly agreed to the reading of Young's stipulated testimony to the jury at trial. Regardless, counsel's decision not to subpoena Young for fear that obtaining a warrant against her would negatively affect her testimony was sound trial strategy that we will not second-guess. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).[2]

Regarding defendant's related argument that defense counsel failed to call an expert witness to testify regarding rape-trauma syndrome, there is no indication in the record that defendant wanted such an expert to testify at trial, and he does not specify how the testimony

[2] We also note that, by way of the stipulated testimony, defendant essentially got the benefit of Young's testimony without her having to be subjected to cross-examination by the prosecution.

would have aided his case. Regardless, the decision whether to call witnesses is a matter of trial strategy that this Court will not second-guess. *Id*.

The record also does not support defendant's claim that defense counsel provided bad advice when she advised him not to testify on his own behalf. We are unable to find any record evidence that counsel advised defendant not to testify. The record reveals that defendant understood that the ultimate decision whether to testify was his own.

Defendant argues that defense counsel failed to provide him with discovery or otherwise communicate with him. The record reveals that his first defense attorney, who withdrew before trial due to a breakdown in the attorney-client relationship, met with him multiple times and provided him discovery materials. Defendant's second defense attorney, who represented him at trial, also met with defendant multiple times. The record indicates that defense counsel tried to obtain defendant's side of the story, but defendant would not cooperate. Any lack of communication or failure to provide discovery to defendant is not apparent on the record.

Finally, defendant claims that defense counsel failed to file motions on his behalf, but he fails to specify what motions counsel should have filed. To the extent that defendant is referring to the pro se motion he filed in the lower court, the record indicates that defense counsel argued that motion to the court, attempting as best she could to summarize defendant's arguments, and that the trial court denied the motion. Defendant cannot show that, had defense counsel authored the pretrial motion alleging the same claims, there was a reasonable possibility that a different outcome would have resulted. See *Matuszak*, 263 Mich App at 57-58.

Defendant next raises two claims of prosecutorial misconduct. Because defendant failed to raise these claims below, our review is limited to ascertaining whether there was plain error that affected substantial rights. *People v Bennett*, 290 Mich App 465, 475-476; 802 NW2d 627 (2010). If defense counsel fails to object to a prosecutor's remark, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005).

Defendant first argues that the prosecution committed misconduct when it introduced prejudicial other-acts evidence. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Nor must the prosecution use the least prejudicial evidence available to establish a fact at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). As established above, the other-acts evidence was properly admitted to show defendant's propensity to commit sexual assaults against young girls and to rebut defendant's theory that JS fabricated the allegations. See *Watkins*, 491 Mich at 470 ("MCL 768.27a . . . permits the use of evidence to show a defendant's character and propensity to commit the charged crime "). Defendant has failed to demonstrate that the prosecution's presentation of the other-acts evidence was not in good faith. Therefore, this claim of prosecutorial misconduct fails. Defendant also argues that the prosecution failed to abide by the court's rulings when it continued to ask improper questions after the trial court sustained objections by the defense. However, defendant fails to specify which questions were improper. After review of the record, we are unable to find any clear instances of the prosecution failing to abide by the trial court's rulings. To the extent that an isolated remark or question went unnoticed by defense counsel, defendant has not shown that the prejudice from

those questions was so great that it could not have been cured by a timely objection. *Williams*, 265 Mich App at 70-71. Therefore, this prosecutorial-misconduct claim fails as well.

Defendant next argues that the trial court was biased against him and deprived him of his right to a fair and impartial trial. We disagree. Defendant failed to raise this issue below. Therefore, we review defendant's claim for plain error affecting substantial rights. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005). A trial court violates a criminal defendant's right to a fair and impartial trial when its conduct "[is] of such a nature as to unduly influence the jury . . . ." *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (internal quotation marks and citations omitted).

Defendant first contends that the trial court was biased against him because it allowed testimony from a witness (the prior sexual-assault victim) whom defendant had previously shot. However, the jury, at defense counsel's request, never learned the information about the shooting, and the witness's testimony, as noted above, was highly probative and admissible. The admission of it does not evidence bias. Defendant's second contention, that the trial court failed to read his motion and state its reasons for denying it, is contradicted by the record. The trial court stated, "I've had an opportunity to look at the motion," and then proceeded to explain its ruling on each of the claims in defendant's motion. Finally, defendant appears to be arguing[3] that the trial court exhibited bias against him by admitting into evidence a vibrating back massager that was purportedly missing before trial. The record indicates that the trial court admitted the massager over defendant's objection that he did not have the opportunity to conduct DNA testing on the item. The court explained that, according to the forensic scientists, it could not be tested and, regardless, the purpose of defendant's DNA expert was limited to reviewing the findings by the prosecution's forensic scientists. The expert was not retained to conduct independent testing on items of evidence. We hold that this decision to admit evidence was not outside the range of reasonable and principled outcomes. *Orr*, 275 Mich App at 588-589. Consequently, the court's decision did not deprive defendant of a fair and impartial trial.

Defendant argues that he was denied his right to a speedy trial because his trial date was changed from June 20, 2011, to December 6, 2011, a nearly six-month delay. Whether the trial court denied defendant his right to a speedy trial is a mixed question of law and fact. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). This Court reviews the trial court's factual findings for clear error and reviews the constitutional issue de novo. *Id.* In order to determine whether a defendant has been denied a speedy trial, a court must weigh (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

Regarding the length of, and reason for, the delay, the record indicates that defendant either requested or did not object to the various continuances granted in this case. When the trial date was first changed so that forensic scientists could conduct DNA testing on evidence gathered in the case, defendant had "no objections[.]" Trial was delayed a second time after

[3] Defendant's brief is disorganized and unclear.

defendant obtained new counsel and requested to have the DNA test results examined by a second expert. The final delay was due to docket congestion. Thus, except for the final delay, defendant either was responsible for, or agreed to, the delays. Also, the final delay due to docket congestion is "given a neutral tint and . . . assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id.* at 263 (internal quotation marks and citations omitted). Therefore, on balance, the reasons for, and length of, the delay factor against defendant. Defendant also fails to show how his defense was prejudiced by the delay. He cites case law regarding a criminal defendant's inability to prepare a defense, but fails to articulate how he was unable to prepare his defense. Both of defendant's trial attorneys stated on the record that they met with him, discussed his case, and pursued the witnesses he wished to have. In the absence of any examples of prejudice from defendant, we are unable to find any proof in the record that the delay prejudiced defendant's ability to defend. Taken together, the facts demonstrate that the trial court did not deny defendant his right to a speedy trial.

Finally, defendant raises a collection of claims that do not require extended analysis. Defendant argues that the lower court erred in amending the charges, at the time of the preliminary examination, to allege seven counts of first-degree criminal sexual conduct instead of five counts of third-degree criminal sexual conduct.[4] However, defendant counsel affirmatively stated "no argument at this time" when the prosecution moved to amend the charges; thus, the issue has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, as noted in *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993), "an examining magistrate may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge. The magistrate is not bound by the limitations of the written complaint." At the preliminary examination, facts were ascertained that allowed amendment of the previously-filed charges. Moreover, defendant cannot show how he was prejudiced by the amendment, which requires a showing of "unfair surprise, inadequate notice, or an insufficient opportunity to defend against the accusations lodged against him." *People v Hunt*, 442 Mich 359, 365; 501 NW2d 151 (1993) (emphasis removed); MCR 6.112(H). The material additions to the charges, for purposes of defendant's appellate argument, were the allegations that JS was defendant's granddaughter and that seven, not five, instances of abuse had occurred. Defendant has not suggested how his attorney's questioning of JS would have been different had the charges been consistent from the beginning of the case.

Defendant also contends that the trial court erred in denying his request for a bench trial. This claim is without merit because the trial court need not provide any reasons for denying a defendant's request for a bench trial. See MCL 763.3(1); *People v Jones*, 195 Mich App 65, 69; 489 NW2d 106 (1992). At any rate, the record shows that defendant was merely considering asking for a bench trial and that the court advised him to think about the decision. The record fails to reveal that defendant thereafter made a formal request.

Finally, defendant claims that his presentence investigation report is "incorrect and incomplete[,]" but he fails to specify how the report is incorrect or incomplete. Our review of

[4] Defendant makes no specific argument about the distribution charge.

the record and report reveals one clerical error. As noted by the prosecution at sentencing, the report indicates that the basis for defendant's first-degree criminal sexual conduct convictions was the victim's being less than 13 years old. The actual basis for his convictions was a "relationship" with the victim who was between 13 and 16 years old. The trial court instructed that the report be corrected to reflect the correct charges, but the correction was apparently not made. Therefore, we remand this case for the limited ministerial task of making this clerical correction. In all other respects, we affirm defendant's convictions and sentences.[5]

Affirmed, but remanded for the limited ministerial task of correcting a clerical mistake in the presentence investigation report. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter

[5] Defendant also raises a sufficiency-of-the-evidence argument in his Standard 4 brief; as discussed above, the prosecution presented sufficient evidence, through the testimony of JS, to sustain the convictions in this case. He also appears to be raising some additional issues, but it is simply impossible for us to interpret or analyze them because they are worded so vaguely and imprecisely. See *People v Kevorkian*, 248 Mich App 373; 639 NW2d 291 (2001) (discussing the importance of briefing appellate issues properly).