STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 3, 2013
v	No. 305586 Wayne Circuit Court
LAMONT ALPHONSO JONES, Defendant-Appellant.	LC No. 11-001142-FC

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was sentenced to concurrent prison terms of 25 to 50 years for each first-degree criminal sexual conduct conviction and 5 to 15 years for second-degree criminal sexual conduct. We affirm.

I. FACTUAL BACKGROUND

The victim, 12 years old at the time of trial, lived with her mother. Defendant, a friend of the victim's older brother, began caring for the victim when her mother was away and practically lived in the home. When the victim was nine years old, she became involved in a sexual relationship with defendant. Their first sexual encounter occurred when they went upstairs to a bedroom and defendant rubbed his penis against her vagina. After this initial encounter, the victim and defendant would have sex almost every other day, including oral and anal sex.

One particular occasion occurred in September 2010, when the victim and defendant were engaged in vaginal intercourse in the living room. One of the victim's brothers and his friend looked through the window and saw defendant and the victim. Defendant told the victim to leave the house and that he would tell her brother it was a different girl. However, the victim's brother testified that he saw the victim and defendant having sex. The friend also testified that he saw defendant having sex with a girl, but he could not see the girl's face. Both the brother and his friend testified that defendant told them not to tell anyone and that he was with a different girl.

The victim admitted that she had been suspended from school on numerous occasions and that she had been placed on a tether. She also indicated that she had been sent to a mental hospital. The victim's mother testified that the victim had some truancy problems that worsened over time, and that the victim was admitted to Hawthorne, a psychiatric hospital, after refusing to go to school.

According to the victim, her mother paid for two cellular phones with which the victim and defendant would exchange text messages. Defendant referred to the victim as "baby babe" or "wifey" in some of the text messages. The victim also claimed that she told a school counselor that she was having sex with defendant. The counselor, however, testified that the victim said she was having sex with a male classmate, although the counselor did not believe her. The counselor contacted child protective services and the victim's mother, communicating suspicions that the victim might be pregnant.

The victim also recalled one time when she was 11 years old and her friend was spending the night. While the victim and defendant were having sex, the friend walked into the bedroom. The friend testified to seeing the victim's vagina in defendant's mouth, and that defendant said he would kill himself if they told anyone about the relationship. The victim then sent a message to her friend's mother, confessing that she was having sex with defendant. The victim's parents were notified, and they took the victim to the hospital for a physical examination.

Because the victim recently had sex with defendant, nurses took a number of samples including a swab of the victim's neck because defendant would suck on and kiss her neck. A certified sexual assault nurse examiner testified that the victim stated that she had sex with defendant and he threatened to kill himself if she refused. The nurse testified that the vaginal examination was consistent with the victim's reported history.[1]

An expert in forensic biology and DNA analysis testified that DNA from the victim's neck was consistent with defendant's DNA. The expert explained that the sample was more consistent with direct contact, not a secondary transfer that would occur if the victim touched a surface with defendant's body fluid and then touched her neck. Another person's DNA, not belonging to the victim or defendant, was detected but the sample was too small to be used as a match.

After reporting the sexual relationship, the victim participated in two Kids Talk interviews.[2] Before the first Kids Talk interview, defendant told the victim that they could get out of the situation and be together if she denied that they had sex. Accordingly, the victim denied having sex with defendant and reported that she had sex with two boys at school. Before her second interview with Kids Talk, the victim smoked marijuana and had sex with defendant.

[1] While at the hospital, the victim sent a message to male friend with whom she had a relationship.

[2] Kids Talk is an independent group that specializes in forensic interviews with children.

She claimed that during this second interview, she told the truth about having sex with defendant.

The victim and defendant continued their sexual relationship even after the second Kids Talk interview. The victim testified that she last had sex with defendant in a car parked at the West Chester Towers, he lost his cellular phone, and he was arrested when they returned home. Defendant, however, testified that he was looking for his cellular phone in the car and the victim came out to apologize to him and tell him that she would fix the situation. The arresting police officer testified that he saw defendant leaning outside of a parked car and saw a female exit the car and go into a nearby house.

At trial, defendant testified to a much different version of events. He claimed that he considered the victim to be like a sibling and that he did not look at her in a sexual way. He denied using her mother's cellular phone for text messages. He claimed that he had sex in the house with girlfriends, and that when the victim's brother and friend saw him in living room, he was having sex with one of his girlfriends. Defendant also testified that the victim was out of control and that she hung out with boyfriends all the time. According to defendant, the victim was involved in a sexual relationship with her friend's brother, defendant threatened to tell the victim's mother about the relationship, and in retaliation the victim reported that she was having sex with defendant.

The jury found defendant guilty of five counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Defendant filed a motion for a new trial, contending that the mandatory 25-year sentences were a miscarriage of justice, he rejected the plea offer because the prosecution only disclosed one witness, and prejudicial text messages were admitted at trial. The trial court denied defendant's motion. Defendant now appeals on several grounds.

II. RULE OF COMPLETENESS

A. Standard of Review

On appeal, defendant first argues that the trial court erred in allowing the prosecutor to play a video recording of the victim's second Kids Talk interview. Generally, we review a trial court's evidentiary rulings for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007).[3] "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id.* at 588-589.

B. Analysis

[3] The prosecution contends that defendant waived and forfeited this issue. While defense counsel's statements regarding this second interview were certainly contradictory, he objected to the admissibility of this video, and tried to prevent the jury from viewing it. Further, because there was no error in admitting this video, our analysis would not change even if we agreed that defendant waived or forfeited this issue.

Defendant contends that the trial court erred in allowing this video to be played to the jury because it was hearsay and did not qualify as a prior consistent statement under MRE 801(d)(1). However, that was not the basis for admission. Rather, the prosecution contended that this evidence was admissible under the rule of completeness, and the trial court agreed.

MRE 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Known as the rule of completeness, "[t]he premise of the rule is that a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990).

In the instant case, defendant played the video of the first Kids Talk interview for the jury. He then cross-examined the victim with her statements from the video and with her statements from the second Kids Talk interview, although he declined to play the second video for the jury. During redirect examination, the prosecution asked the victim questions about the second interview, and then moved to admit the interview under the rule of completeness. The trial court granted the prosecution's motion.

Consistent with the trial court's ruling, this second interview was admissible under the rule of completeness. While defendant initially contends that MRE 106 only applies when trying to admit the remainder of one video, the rule specifically references the use of "any other part or *any other writing or recorded statement*[.]" MRE 106 (emphasis added). Further, defendant voluntary played the first interview with the victim's exculpatory statements, but tried to avoid playing the second interview with the victim's inculpatory statements. This second recording was an "other . . . recorded statement which ought *in fairness* to be considered contemporaneously with [the first.]" MRE 106 (emphasis added). This evidence was relevant to provide an intelligible presentation of the full context of the victim's statements and credibility. See *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996) ("it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.").

Moreover, even if this evidence was improperly admitted, any error was harmless beyond a reasonable doubt. MCR 2.613. Both in cross-examination and redirect examination, the jury heard evidence of what the victim said in this second Kids Talk interview. Furthermore, the victim, who was 12 years old at the time of trial, testified that she and defendant engaged in a continuous sexual relationship from the time she was nine years old. The victim's brother testified that he saw defendant and the victim engaging in sexual conduct in the living room. The victim's friend likewise testified that she saw defendant and the victim engage in sexual behavior on a separate occasion in the bedroom. Consistent with the victim's statements that defendant would suck on or kiss her neck, an expert in DNA analysis testified that defendant's DNA was found on the victim's neck, and that it was most likely from direct contact.

In light of the overwhelming evidence of defendant's guilt, and the fact that jury already heard testimony about the victim's statements in the second interview, we find any error harmless beyond a reasonable doubt. MCR 2.613

III. SENTENCING

Defendant next contends that his mandatory 25-year minimum sentences for first-degree criminal sexual conduct constituted cruel or unusual punishment under Const 1963, art 1, § 16, because the trial court lacked discretion in imposing that sentence.[4] However, this Court previously considered and rejected similar constitutional arguments in *People v Benton*, 294 Mich App 191, 203-207; 817 NW2d 599 (2011). Defendant also failed to analyze the three-pronged test articulated in *Benton*, 294 Mich App at 204, regarding the severity of the sentence and gravity of the offense, penalties for other crimes in Michigan, or penalties for this crime in other states. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (it is not "up to this Court to discover and rationalize the basis for [defendant's] claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). Thus, defendant has failed to establish any error requiring reversal.

IV. STANDARD 4 BRIEF

A. Standard of Review

Defendant raises several additional issues in his Standard 4 brief including claims of substantive error and alleged ineffective assistance of counsel.

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Because "[w]e have previously denied defendant's request for a remand . . . and we decline to reconsider defendant's request . . . our review of defendant's claim[s] of ineffective assistance of counsel is limited to errors apparent on the record." *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant first must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted); see also *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, the defendant must show that counsel's deficient performance prejudiced his defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

[4] Defendant cites *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and we recognize the holding in *Miller v Alabama*, __ US __; 132 S Ct 2455, 2469; 183 L Ed 2d 407 (2012), that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." However, defendant did not receive a mandatory life sentence without the possibility of parole, so these cases are inapposite.

proceeding would have been different." *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted); see also *Strickland*, 466 US at 687-688.

B. Failure to Investigate & Impeach

Defendant first argues that the police and the prosecutor did not adequately investigate available telephone records and other suspects, thereby violating his right to due process. However, "[t]he police are not required to seek and find exculpatory evidence." *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Similarly, "[t]he prosecutor is not required to do defendant's investigation for him." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). As our Supreme Court explained in *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006), "[f]or due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance." Because defendant's claims are based on the adequacy of the state's investigation, not on the failure to produce or disclose known evidence, he has not established any due process error.[5]

Defendant also argues that defense counsel was ineffective for failing to investigate records from a cellular phone in his name. Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012) (quotation marks and citation omitted). However, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy[.]" *Horn*, 279 Mich App at 39.

In the instant case, there is no indication that defendant owned a separate cellular phone or, if he did, that it contained relevant information regarding texts from, to, or about the victim. There is no basis to conclude that counsel's behavior deprived defendant of a substantial defense. See *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990) (the failure to investigate must result "in counsel's ignorance of valuable evidence which would have substantially benefited the accused."). Further, even if counsel did not investigate this cellular phone, and even if that decision was unreasonable, defendant has not demonstrated prejudice. The victim testified that she engaged in sexual conduct with defendant from the time she was nine years old. The victim's friend and brother also testified to observing separate incidents of sexual conduct between the victim and defendant. There was DNA evidence linking defendant's DNA to the victim's neck through direct contact. A nurse also testified that a physical examination of the victim, 12 years old at the time of trial, was consistent with her reported sexual history. In light of this evidence, defendant has failed to establish that any records from this alleged cellular phone would have altered the outcome of the proceedings.

[5] Although defendant implies that there was a failure to preserve evidence, he does not identify any evidence that was allegedly lost.

Defendant also argues that his trial counsel was ineffective for failing to investigate and use the available text messages to impeach the victim in order to show that she had a relationship with someone other than defendant. Contrary to defendant's assertions, defense counsel vigorously used text messages at trial in an attempt to impeach the victim's credibility. Counsel used a text message containing the initials EMH and a "love heart image" to cross-examine the victim's mother and link the text message to the victim, in an effort to discredit the victim's testimony. Defense counsel also used other text messages to cross-examine the victim, including the victim's text message with a male while at the hospital. Counsel highlighted these text messages to support and develop the defense theory that the victim was making false accusations against defendant because she wanted to hide a sexual relationship with another person. Thus, defendant has not demonstrated that counsel's conduct fell below an objective standard of reasonableness.[6]

C. Perjury

We also reject defendant's argument that the prosecutor engaged in misconduct in failing to correct false testimony. Defendant contends that the prosecutor knowingly introduced the false testimony that defendant and the victim, through two cellular phones owned by the victim's mother, exchanged text messages. However, "[w]e have no reason to conclude that" there was false testimony. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Although defendant denied exchanging the disputed text messages and contends that he owned his own cellular phone, such conflicting testimony merely established a factual issue for the jury. Knowledge of falsity will not be imputed to the prosecutor simply because testimony from one witness conflicts with another. *People v Lester*, 232 Mich App 262, 278; 591 NW2d 267 (1998). Thus, "there is no indication in the record that, even if [the witnesses] testified falsely, the prosecutor knew [they] would testify falsely." *Herndon*, 246 Mich App at 417. Therefore, we reject this claim of error.

D. Forensic Scientist

Defendant next argues that he was deprived of his Sixth Amendment right to confront witnesses against him because the forensic scientists who actually conducted the DNA testing did not testify at trial. However, defense counsel expressly stipulated to these scientists not testifying and to the admission of the laboratory reports, which resulted in a waiver of this issue. See *People v Buie*, 491 Mich 294, 306; 817 NW2d 33 (2012) ("[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel.").

Moreover, defendant has not demonstrated that defense counsel was ineffective for providing these stipulations. While defendant insists that every individual who was involved in the DNA testing should have been called to testify, he offers no evidence or argument for why that tedious presentation of evidence was necessary. Beyond mere speculation, defendant has not specified any defect in the testing that behooved trial counsel to behave differently.

[6] There also is no indication that counsel failed to conduct a reasonable investigation or that other relevant text messages existed.

Further, there is a strong presumption that trial counsel made sound strategic decisions. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Considering the results of the DNA test that linked defendant's DNA to the victim, defense counsel could have reasonably decided that stipulating to the admission of these results would avoid focusing the jury's attention on this damaging evidence. See e.g., *People v Eliason*, __Mich App__; __NW2d__ (Docket No. 302353, issued April 4, 2013) (slip op at 5) (it may be sound trial strategy to refrain from objecting to unfavorable evidence as it draws the jury's attention to it). Defendant has not overcome the presumption that counsel's strategy was sound. *Buie*, 491 Mich at 311.

E. Victim's Mental Health

Defendant next argues that defense counsel was ineffective for failing to investigate the victim's mental health records. He alternatively argues that defense counsel should have explored the victim's mental health history further at trial.

There is no evidence to support defendant's contention that his counsel failed to investigate the victim's mental health history before trial. On the contrary, the record demonstrates that defense counsel was aware of the victim's mental health history and cross-examined her and her mother accordingly. Defense counsel specifically asked the victim if she had spent time in a mental health facility, when she stayed there, whether she was prescribed medications, and whether she had been admitted to that facility because she stabbed her mother. There is no basis to conclude that any additional information existed or would have been relevant to a material issue at trial. See *People v Moore*, 246 Mich App 172, 174; 631 NW2d 779 (2001) ("[g]enerally, all relevant evidence is admissible, while irrelevant evidence is not admissible.").

We also reject defendant's argument that his counsel behaved improperly in failing to obtain the victim's full mental health records. In order to obtain privileged records, defendant would need to establish that these records were likely to contain material information necessary for the defense. *People v Stanaway*, 446 Mich 643, 649; 521 NW2d 557 (1994). If that burden is satisfied, the trial court then would conduct an in camera inspection to determine whether the records contain reasonably necessary information to the defense. *Id.* at 649-650.

Here, defendant has offered nothing to demonstrate a reasonable probability that the victim's mental health records were likely to contain material information necessary for the defense. Instead, defendant merely suggests that his counsel was constitutionally required to go on a fishing expedition because the victim could have been suicidal, which the jury would want to know. Because defendant has not shown that he would have been entitled to the victim's mental health records, any motion would have been futile, and counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

F. Failure to Call Witnesses

Defendant next challenges his counsel's failure to call various witnesses to the stand.[7] First, defendant argues that defense counsel should have investigated and called an alibi witness who would have testified that she, not the victim, had sex with defendant in the living room. The record does not disclose what efforts defense counsel made to investigate this potential witness. "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012) (quotation marks and citation omitted); see also *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) ("Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.").

Furthermore, it appears that defendant, not defense counsel, thought this witness was unnecessary. When specifically asked at trial whether he had any reason to bring this witness to trial, defendant replied "No." See *Strickland*, 466 US at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Consistent with defendant's statements, defense counsel asserted in closing argument that there was no reason for this witness to testify because "the lack of evidence speaks for itself." Defendant failed to overcome the strong presumption that counsel's strategy was sound under the circumstances. *Buie*, 491 Mich at 311. In light of the existing record, we reject defendant's claim of ineffective assistance of counsel.[8]

Defendant next contends that his counsel was ineffective for failing to investigate the victim's friend's brother, who supposedly had a sexual relationship with the victim. Defendant has not submitted an offer of proof regarding the nature of this witness's testimony, and there is no indication that this witness would have testified favorably for the defense. *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990) (a substantial "defense would be one in which defendant's proposed [witness] verified his version."). Moreover, given that the unidentified DNA sample from the victim's neck was too small to be tested, it would have been futile to

[7] Although defendant correctly observes that he has a due process right to present a defense, *Anstey*, 476 Mich at 460, his substantive argument is not that he was precluded from asserting any specific defense. Rather, defendant argues that his counsel was ineffective for failing to present favorable evidence, which is how we will analyze this issue.

[8] While defendant attached an unsworn "affidavit of truth" with his motion to remand, pursuant to MCR 7.211(C)(1)(a), a motion to remand must be supported by "affidavit or offer of proof regarding the facts to be established at a hearing." An unnotorized statement is not an affidavit under MCR 7.211(C)(1). *People v Ybarra*, 493 Mich 862; 820 NW2d 908 (2012) (ZAHRA, J. concurring); see also *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011).

request additional DNA testing. The failure to make a futile motion does not constitute ineffective assistance of counsel. *Fike*, 228 Mich App at 182.

Defendant also contends that he was denied the effective assistance of counsel because his attorney failed to investigate or call to the stand two male classmates of the victim who allegedly had sex with her. Defendant contends that his counsel should have investigated and used this evidence "so the Jury could see how sexually active [the victim] was." However, defendant has completely failed to address how this evidence is admissible in light of the rape shield statute, MCL 750.520j.[9] Moreover, defense counsel questioned the victim about her accusations against these two individuals, attempting to show that the victim had lied before, just like she was lying about defendant. Defendant has not overcome the strong presumption that this trial strategy was sound. *Buie*, 491 Mich at 311.

G. Plea Negotiations

Defendant next contends that his due process right to a fair plea agreement was violated because the trial court did not explain that he would be subject to a mandatory minimum sentence of 25 years if convicted of first-degree criminal sexual conduct. Yet, defendant did not tender a guilty plea, so his reliance on cases involving a trial court's duty to advise a defendant of certain sentencing consequences before accepting a guilty plea is misplaced.

Furthermore, defendant has failed to establish that he was denied the effective assistance of counsel during plea negotiations. "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v Cooper*, __ US __; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). An "attorney's assistance" should enable "the defendant to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995).

There is no indication that defense counsel harbored any confusion about the 25-year mandatory minimum sentence. To the contrary, at sentencing, defense counsel specifically criticized the fact that there was a mandatory minimum sentence. Furthermore, when placing the offer on the record, the prosecutor specifically referred to the fact that defendant is "facing at least six counts of a mandatory minimum 25 year sentence that could be consecutive to this Court." Defendant again was informed of the mandatory minimum because it was contained in the felony information, which "duly notifies a defendant of the charges instituted against" him. *People v Waclawski*, 286 Mich App 634, 706; 780 NW2d 321 (2009).

Moreover, there is no indication that defendant refused the plea deal because he misunderstood the mandatory minimum sentence he was facing. Defendant maintained his innocence throughout trial and even at sentencing. When moving for a new trial, defendant specifically stated that he rejected the plea offer because he thought the prosecution only had one

[9] As noted above, the two unsigned and unnotarized "affidavit of truth" documents filed with defendant's motion to remand provide no basis for relief because they do not satisfy MCR 7.211(C)(1).

witness against him, and that the jury would find the victim's testimony lacking in credibility. Thus, rather than a misunderstanding about the mandatory minimum of 25 years, the evidence in the lower court suggests that defendant rejected the plea deal because he perceived the prosecution's case was weak, and he wanted to take his chances at trial. Defendant has not demonstrated he is entitled to relief.[10]

H. Appellate Counsel

Defendant also argues that he was deprived of the effective assistance of appellate counsel because his appointed appellate counsel failed to provide him with transcripts and other assistance for his Standard 4 brief. "[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Hence, defendant must show that his appellate counsel's behavior "fell below an objective standard of reasonableness and prejudiced his appeal." *Id.*

Defendant argues that he was denied the effective assistance of appellate counsel because his counsel did not provide him with "[t]ranscripts, discovery, sentence transcripts, Witness investigations and editorial services" and that without those documents he was unable to raise several issues that were "dead bang winners." These conclusory statements fail to identify what exact materials defendant wanted access to but was denied, or what issues he was prevented from raising because he lacked the documents. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) ("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.") (quotation marks and citation omitted). Moreover, defendant has failed to address the fact that he not entitled to "hybrid representation." *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003). Thus, defendant has failed to demonstrate he was constitutionally denied the effective assistance of appellate counsel.

V. Cumulative Error

Lastly, defendant seeks appellate relief on the basis of the cumulative effect of the various errors alleged in his Standard 4 and appellate brief. However, only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 293 n 64; 531 NW2d 659 (1995). Because defendant has not established any errors, there is no cumulative effect that warrants reversal. *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008) ("Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.") (quotation marks and citation omitted). A new trial is not warranted under a cumulative error theory of relief.

[10] Moreover, considering defendant's unsworn statement filed in support of his motion to remand, and the absence of any record support for this claim, remanding for an evidentiary hearing is not warranted. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007); MCR 7.211(C)(1)(a).

VI. CONCLUSION

Defendant has failed to demonstrate any error requiring reversal in the second Kids Talk interview video that was played to the jury. Defendant also failed to establish that his sentences for first-degree criminal sexual conduct constituted cruel or unusual punishment. Lastly, defendant has failed to demonstrate that he was denied the effective assistance of counsel on several grounds, or that there were cumulative errors requiring reversal. Because defendant failed to set forth any additional facts that warrant further development of the record to determine if defense counsel was ineffective, we again deny defendant's request for a remand or resentencing.

We have reviewed any remaining arguments in defendant's briefs and find them to be without merit. We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan