S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2014
v MICHAEL WILLIAM KUZMA, Defendant-Appellant.	No. 311204 Calhoun Circuit Court LC No. 12-000577-FC

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c), third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), and HIV-positive sexual penetration with an uninformed partner, MCL 333.5210. He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 35 years, seven months to 60 years for CSC I, 20 years to 30 years for CSC III, and 45 months to 90 months for HIV-positive penetration. For the reasons set forth below, we affirm defendant's convictions, but vacate his sentences and remand for resentencing.

The instant charges arise from a camping trip that defendant and complainant, then a 15-year-old boy, took on August 7, 2010. A few days earlier, defendant had hired the complainant to work for his moving company. Defendant subsequently invited the complainant to go camping with him after work. According to complainant's trial testimony, they both slept in the back of defendant's vehicle and during the night defendant anally penetrated him for a period of approximately 30 seconds. Defendant testified that he and the complainant went camping together, but denied that he and the complainant slept together in his vehicle or had any sexual contact. The parties stipulated that defendant had contracted HIV in 1994 and was diagnosed with AIDS in 2009. The complainant testified that he was unaware that defendant was HIV-positive at the time of the alleged penetration.

I. COUNSEL OF CHOICE

Defendant first argues that the trial court abused its discretion by denying his motion to adjourn trial in order to retain a different attorney.[1] Defendant retained counsel of his choice more than a year before trial began on May 15, 2012. On the first day of trial, defendant informed the trial court for the first time that he wished to retain a different attorney, citing dissatisfaction with his current counsel's pretrial investigation and preparation. Defendant stated that he had had contact with two potential attorneys and requested an adjournment in order to retain one of them. The trial court denied defendant's request, noting that the parties received notice of the trial date on March 6, 2012 – more than two months in advance of trial – and that the jurors were assembled and the parties were prepared to proceed that day.

The erroneous deprivation of a defendant's right to retain counsel of his choice is a structural error requiring reversal without a showing of prejudice. *United States v Gonzalez-Lopez*, 548 US 140, 148-150; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). In *Gonzalez-Lopez*, 548 US at 146, the United States Supreme Court explained that the Sixth Amendment "commands . . . that the accused be defended by the counsel he believes to be the best." See also *Aceval*, 282 Mich App at 386. However, the Court noted that a defendant's right to counsel of choice must be "balance[ed] against the needs of fairness, and against the demands of its calendar[.]" 548 US at 152 (citations omitted).

In *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983), the Supreme Court stated:

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.

Similarly, we have stated, "the right to counsel of choice is not absolute. A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003) (quotation marks and citations omitted).

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[1] "We review for an abuse of discretion a trial court's exercise of discretion affecting a defendant's right to counsel of choice." *Akins*, 259 Mich App at 557 (quotation marks omitted). An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In light of these standards and the procedural history of this case, we conclude that the trial court did not abuse its discretion by declining to adjourn the trial on the day it was to begin in order to allow defendant to attempt to retain different counsel. See *People v Weddell*, 485 Mich 942, 944; 774 NW2d 509 (2009); *People v Strickland*, 293 Mich App 393, 399; 810 NW2d 660 (2011) (holding that a substitution of counsel "would have unreasonably delayed the judicial process" where the defendant "waited until the day of trial to request new counsel[,]" [t]he jury and witnesses were present, and the prosecutor and defense counsel were ready to proceed").

However, we do find that defendant's Sixth Amendment rights were violated during his sentencing proceedings.

A defendant possesses a Sixth Amendment right to counsel during a sentencing hearing. *People v Eason*, 435 Mich 228, 234 n 8; 458 NW2d 17 (1990); *Mempa v Rhay*, 389 US 128; 88 S Ct 254; 19 L Ed 2d 336 (1967). Defendant filed a "notice of termination of counsel," dated June 11, 2012, with the trial court that provided:

> Please take notice that until further notice Defendant, MICHAEL W. KUZMA is proceeding in propria persona. Attorney David G. Moore is no longer representing the defendant and any pending motions filed by David G. Moore are hereby recalled by Defendant. Until further notice please communicate directly with Defendant, MICHAEL W. KUZMA at his address disclosed by the record regarding any and all matters pertaining to the above-titled cause.

The trial court's register of actions indicates that it received defendant's notice on June 14, 2012. At the sentencing hearing, conducted one week later on June 21, 2012, defendant reiterated his desire to terminate the representation of his trial counsel and objected three times, stating, "I object to these proceedings actually taking place at this time," "I object . . . to these whole proceedings," and, "I object to these proceedings going on[.]" Defendant further stated, "Mr. Moore, the attorney – former attorney . . . was served with a notice of termination of counsel, and so was this Court, on June 11th."

The trial court never responded to defendant's request to terminate counsel's representation or his request to represent himself. The court should have either conducted "the judicial inquest necessary to effectuate a valid waiver [of his right to an attorney] and permit [] defendant to represent himself[,]" *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004), or adjourned the sentencing hearing to allow defendant to obtain new counsel. Unlike defendant's request to adjourn before trial, an adjournment at this point would not have impeded the "prompt and efficient administration of justice[.]" *Akins*, 259 Mich App at 557. Defendant or his new counsel could quickly prepare for the brief sentencing hearing. Defendant was incarcerated at this time; therefore, an adjournment would not have unduly endangered the public. Further, the sentencing hearing was held nearly a month after the jury delivered their guilty verdicts, and a brief further delay would not have significantly impacted the court's docket management obligations. Accordingly, the court's failure to either adjourn sentencing or inquire into defendant's request to represent himself constituted an erroneous deprivation of defendant's right to counsel of his choice and, thus, defendant is entitled to a new sentencing hearing without demonstrating prejudice. See *Gonzalez-Lopez*, 548 US at 148-150; *Aceval*, 282 Mich App at 386.

At the resentencing hearing, defendant may elect to be represented by counsel of his choice or represent himself. If defendant elects the latter, the trial court shall question defendant until it is satisfied that:

> (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*Russell*, 471 Mich at 190.]

Moreover, the court must satisfy the requirements of MCR 6.005(D), which requires that defendant be provided the opportunity to consult with court-appointed counsel if he so desires. *Russell*, 471 Mich at 190-192. Accordingly, we vacate defendant's sentences and remand for a resentencing hearing in accordance with this opinion.[2]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his trial counsel was ineffective on numerous grounds. Defendant did not preserve these issues for appeal as he failed to move the trial court for a new trial on the basis of ineffective assistance of counsel and the court did not hold a *Ginther*[3] hearing. See *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). Accordingly, our review is limited to errors apparent in the record.[4] *People v Snider*, 239 Mich App 393, 420, 423; 608 NW2d 502 (2000).

"To establish ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the

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[2] We also note that the trial court appears to have failed to comply with MCR 6.425(B). Specifically, defendant did not receive a copy of his presentence investigation report (PSIR) at least two business days prior to the sentencing hearing. Defendant raised this issue at sentencing, and the trial court merely provided defendant a brief opportunity to review the PSIR during the hearing. This opportunity was insufficient to satisfy the requirements of MCR 6.425(B). Accordingly, we direct the trial court to provide defendant and/or defendant's chosen counsel with a copy of defendant's PSIR at least two business days prior to the resentencing hearing and to comply with all other court rules applicable to a sentencing proceeding.

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

[4] "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). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant first asserts that his trial counsel was ineffective for failing to respond to the prosecution's motion to compel the Michigan Department of Health to produce defendant's medical records and for failing to appear at the concomitant April 23, 2012 motion hearing. There is no arguable trial strategy sufficient to justify defense counsel's failure to respond to the prosecution's motion or appear at the hearing. Accordingly, defense "counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms." *Id*. However, defendant cannot establish that but for counsel's error "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id*. Defendant does not argue that his medical records were inadmissible or that the trial court's order to compel these medical records was improper. Nor does he not specifically contend that, or explain how, counsel's response to the prosecution's motion or appearance at the April 23, 2012 motion hearing would have prevented the prosecution from obtaining defendant's medical records. Moreover, at trial, the parties stipulated to the fact that defendant contracted HIV in 1994 and was diagnosed with HIV in 2009, and defendant testified that he had AIDS at the time of the August 2010 camping trip. Accordingly, defendant is not entitled to relief on this basis.

Defendant next contends that counsel was ineffective for failing to request defendant's appearance at a May 14, 2012 hearing, during which the trial court ruled that evidence of defendant's other acts was admissible under MCL 768.27a. The evidence in question was testimony from another individual that, in 1988, defendant sexually assaulted him on multiple occasions and attempted to anally penetrate him. Defendant testified at trial and acknowledged that he sexually assaulted this individual and that he was subsequently convicted of CSC III and ultimately served 15 years in prison as a result of that conviction. Assuming defendant was not present at the hearing, and that his absence was the result of counsel's failure to request his appearance, defendant has not demonstrated that any of the trial court's rulings from the May 14, 2012 hearing were erroneous, nor does he attempt to explain how his presence at the hearing would have altered the outcome of the hearing or subsequent trial. Again, therefore, defendant has failed to demonstrate "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id*. Accordingly, his claim of ineffective assistance of counsel on this basis fails.

Defendant argues that counsel was also ineffective for failing to adequately investigate the case in several respects.

First, he asserts that counsel failed to obtain phone and computer records of conversations between himself and the complainant that may have provided exculpatory evidence. However, defendant does not explain what efforts trial counsel undertook or should have undertaken to obtain the relevant telephone and computer records. Moreover, defendant does not explain what exculpatory evidence, if any, he believes was contained in the telephone or computer records; he merely contends that the records should have been "checked for the possibility of any conversations or interaction between the two which would be of an exculpatory nature." The record does not contain any indication of the nature or substance of the records. Thus, even assuming that counsel did not investigate and review the telephone and computer records,

defendant has not shown that counsel was ineffective for failing to request the records. *Snider*, 239 Mich App at 420, 423; *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

Second, defendant argues that his counsel failed to adequately investigate information that the complainant had been adjudicated as a juvenile of a CSC offense in 2008, and that counsel failed to use such evidence to attack the credibility of the complainant. The lower court record contains no evidence of such an adjudication, but defendant has attached documents that, if accurate, indicate that complainant was so charged as a juvenile. Even if we were to consider these non-record documents, and assume that defendant's factual assertions concerning them are true, reversal would not be required because evidence of the CSC adjudication would not have been admissible, even for impeachment purposes. Michigan's rape-shield statute, MCL 750.520j, provides in relevant part:

> (1) 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 [MCL 750.520b to 750.520g] 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.

"The statute and its parallel provisions in the Michigan Rules of Evidence, MRE 404(a)(3), constitute a policy determination, that sexual conduct or reputation as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant." *People v Hackett*, 421 Mich 338, 346; 365 NW2d 120 (1984) (citation omitted); see also *People v Benton*, 294 Mich App 191, 197-198; 817 NW2d 599 (2011).

Evidence that the victim was charged with a CSC offense in 2008 would have been inadmissible under MCL 750.520j(1), therefore, as "[e]vidence of specific instances of the victim's sexual conduct," and would not constitute "[e]vidence of the victim's past sexual conduct with the actor" or "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." Moreover, defendant fails to explain how this evidence would be offered for a purpose other than "general impeachment," which is improper under the rape-shield statute. *Id*. at 346, 348. See also *Benton*, 294 Mich App at 197-198. Accordingly, defendant has not demonstrated that his trial counsel was ineffective for failing to investigate and offer evidence of the victim's 2008 CSC charges. Such evidence would also have been excluded under MRE 609(e), which bars impeachment with evidence of juvenile adjudications, as well as MRE 609 generally, because a CSC charge, even as to an adult, does not fall within the requirements for admissibility under that rule. Accordingly, counsel was not ineffective for failing to investigate the complainant's juvenile record.

III. INFORMANT-WITNESS

Defendant raises two arguments regarding a prosecution witness who testified that defendant confessed to sexually assaulting the complainant while the two were lodged together in the county jail. The witness's testimony was undoubtedly damaging. He explained that defendant told him, in graphic detail, the circumstances of the sexual assault, combined with an admission that he used alcohol and drugs to lower the complainant's inhibitions. He also claimed that defendant planned to flee the state if freed on bond.

Defendant argues that he is entitled to new trial because the prosecution committed a *Brady*[5] violation by not disclosing evidence of the informant-witness's criminal and parole records.[6] Defendant has provided this Court with evidence that the informant was convicted of CSC III, had been charged with, or at least accused of, filing a false police report, and had made false statements to his parole officer.

> A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). (citations omitted).] [7]

Prior to trial, the prosecution filed an answer to defendant's disclosure requests and a witness list. The witness list included the informant's name. The same document stated that, "The People know of no criminal convictions of any witness whom the People may call at trial." Evidence of the informant's criminal convictions and parole violations was obviously favorable to defendant's case, and this Court has held that impeachment evidence, as well as exculpatory

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[5] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[6] A defendant asserting an unpreserved claim of prosecutorial misconduct "must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010).

[7] The Michigan Supreme Court has granted leave in a case where it may revisit these factors. *People v Chenault*, 494 Mich 862; 831NW2d 238 (2013).

evidence, falls within the *Brady* rule. *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998).[8]

For purposes of this analysis, we will assume that the prosecution both possessed and suppressed the impeachment evidence, thus satisfying elements (1) and (3) of the above test. *Cox*, 268 Mich App at 448. Nonetheless, defendant is not entitled to relief. First, the informant's conviction for CSC III is easily accessible via Michigan's Offender Tracking Information System (OTIS) online database. Defense counsel could have obtained that information with minimal reasonable diligence. Armed with evidence of the informant's conviction, counsel could have then presumably obtained the informant's more detailed arrest and parole records. Thus, defendant cannot establish element (2) of a *Brady* violation.

Second, defendant cannot show that, had the informant's criminal and parole records been disclosed, that there is a reasonable probability that the outcome of his trial would have been different. To require reversal, the impeachment evidence must have been "material." *Lester*, 232 Mich App at 281-282. "In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case." *Id*. at 282. In this case, the complainant's testimony, coupled with defendant's stipulations, established the necessary elements of the charged crimes. A reasonable jury could have found defendant guilty without the benefit of the informant's testimony and, thus, the testimony was not a critical element of the prosecution's case. Moreover, defense counsel elicited testimony that the informant was a convicted sex offender with the motive and means to falsify his story regarding defendant's jailhouse confession. And, "a new trial is generally not required . . . where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already shown to be questionable." *Id*. Thus, defendant also cannot established element (4) of a *Brady* violation and, therefore, is not entitled to relief on that basis. *Cox*, 268 Mich App at 448.

Defendant also argues that his counsel was ineffective for failing to obtain evidence of the informant's criminal and parole record. However, we cannot conclude that counsel's performance fell below an objective standard of reasonableness, nor that counsel's failure to obtain evidence of the informant's criminal record affected the outcome of defendant's trial. *Yost*, 278 Mich App at 387. First, the substance of the informant's record was revealed in his testimony. He testified that he met defendant while incarcerated after failing a drug test, which constituted a parole violation stemming from a CSC III conviction. He also referred to himself as "a convicted sex offender." Second, defense counsel attacked the informant's credibility on cross-examination. The informant admitted that he had originally asked for a plea bargain or

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[8] Defendant also argues that the prosecution concealed evidence of the complainant's juvenile adjudication in violation of *Brady*. As discussed above, the criminal record of the complainant was inadmissible for any purpose. Accordingly, the prosecution's failure to disclose the adjudication did not affect the outcome of defendant's trial, and defendant is not entitled to relief. *Cox*, 268 Mich App at 448.

other leniency in exchange for his testimony. Defense counsel elicited that the informant had read defendant's arrest documents, and, therefore, raised the possible inference that the informant fabricated his story. In other words, counsel established that the witness had ample motivation to lie and could have obtained the information that he offered as testimony independent of any confession from defendant. Thus, evidence that the informant had previously lied to his parole officer and/or filed a false police report would have been merely duplicative of the other evidence questioning his credibility. Accordingly, defendant has not overcome the presumption of trial strategy in questioning witnesses. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Moreover, the complainant's testimony and defendant's stipulations satisfied the elements of the charged crimes, independent of the informant's testimony. Thus, we find no reasonable probability that, but for counsel's failure to obtain evidence of the informant-witness's criminal record and parole violations, the outcome of defendant's trial would have been different. *Yost*, 278 Mich App at 387. Accordingly, defendant is not entitled to relief on this basis.

IV. NEWLY DISCOVERED EVIDENCE

Defendant argues that, following his conviction, his attorney was notified by the prosecution that, on August 14, 2012, the complainant had been charged with CSC II arising from a February 2012 incident.[9] Defendant asserts that this constitutes newly discovered impeachment evidence that entitles him to a new trial.

A new trial is warranted on the basis of newly discovered evidence when defendant shows that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations and quotations omitted).

> [I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in *Cress*. More specifically, newly discovered impeachment evidence satisfies *Cress* when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and (2) a different result is probable on retrial. [*People v Grissom*, 492 Mich 296, 319; 821 NW2d 50 (2012) (footnotes omitted).]

Defendant has not articulated how a pending charge of CSC II could have been used to impeach the complainant. Even a *conviction* for CSC II is not admissible for impeachment purposes. MRE 609. Similarly, he has not articulated how such evidence, if somehow admissible, would

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[9] We review defendant's unpreserved claim regarding newly discovered evidence for plain error affecting substantial rights. *Cox*, 268 Mich App at 448. Generally, under the plain error rule, defendant must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

create an exculpatory connection that would make a different result on retrial probable. *Grissom*, 492 Mich at 319. Accordingly, defendant is not entitled to relief on this basis.

V. PREVIOUS CSC OFFENSE

Finally, defendant argues that the trial court erred by admitting evidence of his 1988 sexual offense pursuant to MCL 768.27a because the evidence was inadmissible under MRE 403, as its probative value was substantially outweighed by the risk of unfair prejudice.[10]

MCL 768.27a provides that

> in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

In *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012), our Supreme Court ruled that "evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" MRE 403 provides that "[a]lthough 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "'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." MRE 401. In the context of MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value, rather than its prejudicial effect:

> Yet were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a.

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[10] We review defendant's preserved claim of evidentiary error for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010).

> Accordingly, 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. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. [*Watkins*, 491 Mich at 486-487.]

In this case, the trial court did not abuse its discretion by admitting the contested evidence under MCL 768.27a. Evidence that defendant had previously sexually assaulted a minor boy and that the assault involved oral sex and attempted anal penetration was highly probative, as it showed that defendant had a propensity to commit similar acts of sexual misconduct against similar victims. See *Watkins*, 491 Mich at 486-487. Moreover, the prejudicial effect of the evidence was minimized by the trial court's limiting instruction to the jury. *People v Crawford*, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998) ("[A] limiting instruction will often suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose . . . ."); *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions."). Thus, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

We affirm defendant's convictions. We vacate defendant's sentences and remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro