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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,

v

ADAM KEITH TOLEN,

Defendant-Appellant.

UNPUBLISHED
June 20, 2024

Nos. 364170; 364171
Dickinson Circuit Court
LC Nos. 2021-006029-FC; 2021-006030-FC

Before: MALDONADO, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant appeals as of right his jury trial convictions of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and MCL 750.520b(2)(b) (sexual penetration of victim under 13 years of age by defendant 17 years of age or older); one count of CSC-I, MCL 750.520b(1)(h)(*ii*) (sexual penetration of victim who was mentally incapable, mentally disabled, mentally incapacitated, or physically helpless and defendant used authority to coerce the victim); two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and MCL 750.520c(2)(b) (sexual contact with victim under 13 years of age by defendant 17 years of age or older); and one count of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(d) (sexual contact involving relationship by blood or affinity to the third degree). The trial court sentenced defendant to serve concurrent terms of 25 to 45 years' imprisonment for his CSC-I conviction under MCL 750.520b(1)(a) and MCL 750.520b(2)(b); 11 to 45 years' imprisonment for the other CSC-I conviction; 10 to 15 years' imprisonment for each CSC-II conviction; and 16 months to 2 years' imprisonment for the CSC-IV conviction.

On appeal, defendant argues that he was denied effective assistance of counsel when trial counsel failed to object to the admission of hearsay and witness vouching testimony. Defendant also argues that his mandatory minimum sentence of 25 years' imprisonment is disproportionate

[1] *People v Tolen*, unpublished order of the Court of Appeals, entered December 27, 2022 (Docket Nos. 364170 and 364171).

and cruel or unusual. We conclude that trial counsel did not provide ineffective assistance of counsel because neither hearsay nor improper witness vouching testimony was admitted at trial. We also conclude that defendant's mandatory minimum sentence was not disproportionate or cruel or unusual. Accordingly, we affirm defendant's convictions and sentence.

I. BACKGROUND

This case arises from defendant's sexual abuse of his stepdaughter, KM, when she was between the ages of 9 and 16 years old. KM testified that defendant sexually assaulted her on three occasions at her family's home in Iron Mountain, Michigan, and on two occasions at her family's home in Quinnesec, Michigan. KM testified that defendant sexually touched, orally penetrated, and vaginally penetrated her. The last incident of sexual abuse by defendant occurred when KM was 16 years old. Shortly after the last incident on May 13, 2021, KM disclosed the sexual abuse to her mother, Jennifer Graves. KM and her mother went to the police station to file a report that day and KM participated in a forensic interview.

At trial, trial counsel advanced the defense strategy that KM was manipulated into making false allegations against defendant by Graves or that KM was motivated by her own animosity toward defendant to make up allegations against him. In support of this trial strategy, trial counsel questioned Graves about her marriage to defendant. Graves admitted that she wanted out of her relationship with defendant before KM disclosed sexual abuse to her. She denied that she was romantically involved with another man at the time KM made her disclosure. Graves further denied that she ever told KM to fabricate the allegations or helped her make up the allegations. She also testified that defendant and KM frequently fought.

KM testified that she frequently fought with defendant about various topics, including household issues, vaping, and her boyfriend at the time, Dakota Jaeger. KM denied that she fought with defendant about Jaeger the day of her disclosure to her mother. KM explained that she started dating Jaeger in Spring 2021 after she met him in a high school bowling league. She testified that she told Jaeger that defendant "touched her" to explain why she did not want Jaeger to touch her.

Jaeger testified at trial about his relationship with KM. He testified that he wanted to meet defendant when he dated KM, but KM did not want Jaeger to meet defendant. He testified that KM told him that defendant "sexually abused" her. Jaeger testified that he eventually met defendant when defendant came to a bowling alley to pick KM up.

The prosecution also introduced testimony from Karla Lehmann, a forensic interviewer employed by the Caring House Child Advocacy Center. Lehmann testified as an expert about the general process and purpose of a forensic interview before testifying that she interviewed KM. She explained that it was common to see delayed disclosures in child victims of sexual assault, and she explained that it was also common for children to not be able to provide exact ages and dates for when an assault occurred.

After filing the instant appeal, defendant moved to remand to the trial court for a *Ginther*[2] hearing. This Court denied the motion.[3] This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that trial counsel was ineffective for failing to object to inadmissible hearsay and credibility vouching. We disagree. For the reasons stated below, we conclude that trial counsel was not deficient regarding the admission of evidence.

A. STANDARD OF REVIEW

"A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Isrow*, 339 Mich App 522, 531; 984 NW2d 528 (2021) (quotation marks and citation omitted). This Court reviews the trial court's findings of fact for clear error, while it reviews questions of law de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). "Clear error occurs if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018) (quotation marks and citation omitted). Because no *Ginther* hearing was held in the trial court, our review is limited to errors apparent from the record. *People v Acumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020).

Both the United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to obtain a new trial, a defendant must establish that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. "The inquiry into whether counsel's performance was reasonable is an objective one and requires the reviewing court to determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks and citation omitted). Under the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted). We will not substitute our own judgment for that of counsel or use the benefit of hindsight in assessing trial counsel's competence. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Trial counsel is not ineffective for failing to raise meritless or futile objections. *Eisen*, 296 Mich App at 329. Additionally, trial counsel is not ineffective because a trial strategy did not succeed. *People v White*, 331 Mich App 144, 149; 951 NW2d 106 (2020).

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

[3] *People v Tolen*, unpublished order of the Court of Appeals, entered November 16, 2023 (Docket Nos. 364170 and 364171).

B. HEARSAY

Defendant first argues that trial counsel's performance was deficient because she failed to object to or rescinded her objection to purported hearsay testimony provided by Jaeger. We disagree because Jaeger's testimony was not hearsay.

At trial, Jaeger testified that he wanted to meet defendant when he dated KM, but KM did not want Jaeger to meet defendant. When Jaeger began to testify what KM responded when he asked to meet defendant, trial counsel objected on hearsay grounds. Outside the presence of the jury, Jaeger testified that in April or May 2021, KM told him that defendant "sexually abused" her. The prosecution argued that this testimony was admissible under MRE 801(d)(1)(B). Following argumentation of the issue and Jaeger's voir dire outside the presence of the jury, trial counsel stated that she had no further objections. After the jury returned, the prosecution engaged in the following exchange with Jaeger:

> *Q*. [W]e were talking about a conversation you had with [KM]. Do you remember that?
>
> *A*. Yes, ma'am.
>
> *Q*. And what did she tell you in that conversation?
>
> *A*. She told me that she had been sexually abused, but she was vague on the details.
>
> *Q*. How was she during the conversation?
>
> *A*. Her mood?
>
> *Q*. Yes.
>
> *A*. She seemed scared to talk about it.
>
> *Q*. And when, approximately, was this conversation you're referencing?
>
> *A*. Springtime of 2021.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).[4] Hearsay is generally inadmissible except as provided by the Michigan Rules of Evidence. MRE 802. MRE 801(d)(1)(B) provides:

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[4] The Michigan Rules of Evidence were substantially amended on September 20, 2023, effective January 1, 2024. See ___ Mich ___ (2023). We apply the versions of the evidentiary rules that were in effect at the time of defendant's trial.

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ."

To be admissible under this rule:

> the party offering the prior consistent statement must establish four elements: (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (quotation marks and citation omitted).]

Jaeger's testimony is admissible because it meets each of the requirement elements. First, KM testified at trial and was subject to cross-examination. Second, defendant's trial strategy was to expressly accuse KM of fabricating her accusations for two reasons. Defendant asserted that KM made the accusations as a result of manipulation by her mother to get out of her marriage to defendant. Defendant also asserted that KM's own animosity toward defendant after a fight with him the morning she disclosed the sexual abuse to her mother motivated her to fabricate allegations. Third, the prosecution presented Jaeger's testimony that KM made a prior consistent statement that defendant "sexually abused" KM. Fourth, the prosecution presented evidence that the statement was made in April or May 2021 before she disclosed the allegations to her mother. Although Jaeger did not provide an exact date for the statement, sufficient evidence in the record supported that KM made the statement to him before May 13, 2021. KM disclosed her accusations to her mother on May 13, 2021, and filed a report at the police station that day. Jaeger testified that KM made the statement to him in Springtime 2021 when he asked to meet defendant, and he testified that he later met defendant when defendant came to the bowling alley to pick KM up. This supported that KM made the statement before she disclosed her allegations to Graves and filed a police report against defendant. Each of the elements under MR 801(d)(1)(B) were met. See *id*. Accordingly, KM's testimony was not hearsay and trial counsel had no ground to object.

Defendant argues that trial counsel was ineffective because she either did not object to or rescinded her objection to Jaeger's testimony. To the extent that trial counsel did not object or withdrew her objection, she cannot be deemed constitutionally ineffective for failing to raise a fruitless or meritless objection. See *Eisen*, 296 Mich App at 329. However, before she purportedly withdrew her objection, trial counsel argued that Jaeger's testimony was inadmissible hearsay. After argumentation regarding the issue and a voir dire of Jaeger outside the presence of the jury, trial counsel stated that she had no further objections, suggesting that she did not rescind her objection. Trial counsel is not ineffective because a trial strategy did not succeed. *White*, 331 Mich App at 149.

C. FORENSIC EXAMINER'S TESTIMONY

Defendant next argues that trial counsel was ineffective for failing to object to Lehmann's testimony on the grounds that her testimony was impermissible credibility vouching. Defendant also argues that Lehmann's testimony regarding the protocol of a forensic interview was irrelevant and unfairly prejudicial. We disagree as to both arguments.

1. VOUCHING

Defendant argues that trial counsel was ineffective for failing to object to Lehmann vouching for KM during her explanation of the protocol of a forensic interview. Because we disagree that Lehmann engaged in witness vouching, we conclude that trial counsel was not ineffective.

"[I]t is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *People v Douglas*, 496 Mich 557, 583; 852 NW2d 587 (2014) (quotation marks and citation omitted). Instead, witness credibility is "to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, "[a]n expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995). Additionally, "an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id*. Likewise, testimony regarding the forensic interviewing protocol does not constitute improper vouching testimony. See *People v Sardy*, 313 Mich App 679, 723; 884 NW2d 808 (2015), vacated in part on other grounds 500 Mich 887 (2016).

Our Supreme Court addressed the issue of credibility vouching in the consolidated case of *People v Thorpe*, 504 Mich 230; 934 NW2d 693 (2019). In *Thorpe*, an expert in child sexual abuse and disclosure testified that the rate of false reports of sexual abuse by child was between 2% and 4% and that "[w]hen children lie, they lie with a purpose." *Id*. at 240. Our Supreme Court concluded that this testimony was impermissible credibility vouching. *Id*. at 259. Although the expert did not directly testify that the victim did not lie, he essentially concluded so. *Id*. In that case, the expert's credibility vouching constituted plain error affecting substantive rights when the trial was a "true credibility contest." *Id*. at 260.

Defendant argues that Lehmann vouched for KM when she explained the protocol of forensic interviewing. In particular, defendant argues that Lehmann vouched for KM when she described the forensic interview as a "research-based, developmentally sound interview," and explained that the protocol included asking the child interviewee to explain the difference between a truth and a lie. In addition, defendant argues that Lehmann vouched for KM when she described the purpose of the interview as a means to obtain "reliable information" and continuously used the word "disclosure" to refer to the child interviewee's allegations.

Lehmann's testimony regarding the forensic interview protocol did not amount to witness vouching. This testimony was limited to providing general information about the forensic

interview process and its purpose. See *Sardy*, 313 Mich App at 723. First, Lehmann's description of forensic interviewing as a "research-based, developmentally sound interview," and explanation that the process included learning whether the child interviewee knew the difference between a truthful statement and a lie did not comment on KM's veracity. Instead, the purpose of this testimony was to explain why the protocol was developed and how it was designed to elicit untainted allegations. Moreover, Lehmann testified that even if a child did not understand the difference between truth and a lie, she still conducted the interview. This general description of forensic interview protocol did not present the same concern that the expert testimony in *Thorpe* did. It did not imply that KM was truthful simply because she participated in an interview.

Second, Lehmann's testimony that she teaches the child interviewee how to discuss allegations in a narrative format and that the most reliable information is given in narrative form was also provided in the context of the general purpose and process of the interview. This was not a direct or implicit comment on KM's veracity. Instead, in context, this testimony explained that forensic interview protocols are designed to elicit statements from the child without the interviewer influencing the child interviewee's statements. Accordingly, Lehmann did not vouch for KM's credibility with her description of the forensic interview protocol. Additionally, although Lehmann used the term "disclosure" in her testimony to refer to KM's allegations, the record reflects that she used the term to refer to the statements made to her during forensic interviews generally, regardless of their credibility or connection with a criminal investigation. Accordingly, Lehmann did not vouch for KM's credibility.

Because Lehmann did not vouch for KM's credibility, trial counsel was not ineffective for failing to raise a meritless objection. *Eisen*, 296 Mich App at 329. Moreover, trial counsel's decision not to object to Lehmann's description of the forensic interview protocol was a reasonable trial strategy. *Vaughn*, 491 Mich at 670. Trial counsel's defense strategy included the assertion that KM was manipulated by her mother to create allegations against defendant and that the investigation of KM's allegations was cursory and biased. During cross-examination, trial counsel asked Lehmann if she could identify when a child was being manipulated during an interview, to which she responded that there are few indicators of when a child is being manipulated into making a disclosure. Trial counsel later used this testimony during closing argument to highlight that Lehmann had no way of determining if KM was manipulated into making a disclosure. A description of the forensic interview protocol was necessary to present this defense strategy to the jury. The decision to utilize testimony to support a defense theory is a legitimate trial strategy, and trial counsel was not ineffective simply because the strategy was unsuccessful. *White*, 331 Mich App at 149.

2. RELEVANCE

Tucked within his argument that Lehmann impermissibly bolstered KM's credibility, defendant argues that Lehmann's general description of the forensic interviewing process was irrelevant and any probative value was outweighed by the danger of unfair prejudice. This issue was not identified in defendant's statement of questions presented. MCR 7.212(C)(5); *Hunt v Drielick*, 298 Mich App 548, 554 n 3; 828 NW2d 441 (2012), rev'd on other grounds 496 Mich 366 (2014). Ordinarily, we do not consider issues that were not set forth in the statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Considering this claim though, we disagree with defendant.

As a general rule, relevant evidence is admissible and irrelevant evidence is inadmissible at trial. See MRE 402. "Evidence is relevant when it has a tendency to make a material fact more or less probable." *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011) (quotation marks and citations omitted). A material fact is one that is at issue at trial, and materiality "does not mean that the evidence must be directed at an element of a crime or an applicable defense." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000) (quotation marks and citation omitted). Evidence has probative value if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Lehmann's expert testimony about the forensic interview process was relevant. MRE 401. Untrained laypeople lack direct knowledge of forensic interview protocols and how improper interviewing techniques can taint a child interviewee's allegations. Likewise, explanation of the protocol bears on issues regarding accuracy and validity. See *Trakhtenberg*, 493 Mich at 54-55. In this case, defendant asserted that KM was manipulated into making allegations against defendant and that the investigation of KM's allegations was biased and cursory. Accordingly, the admission of the testimony regarding proper interviewing protocols was relevant because it would "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." MRE 702.

Relevant evidence may ultimately 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." MRE 403. All relevant evidence offered by the prosecution is generally prejudicial to defendant. *People v Sharpe*, 502 Mich 313, 333; 918 NW2d 504 (2018). However, MRE 403 is "concerned only with unfairly prejudicial evidence that may be given inappropriate weight by the jury or involve extraneous considerations." *Id*.

Defendant asserts that the probative value of Lehmann's testimony was unfairly outweighed by its implication that Lehmann found KM credible. As previously explained, Lehmann did not testify or imply that she found KM credible. Likewise, nothing in the record indicates that the jury gave Lehmann's testimony unfair weight; nor is there any indication that her testimony created a high risk of juror confusion. See MRE 403. Accordingly, we discern no error in the admission of her testimony. Trial counsel was not ineffective for failing to object to Lehmann's testimony on relevancy and unfair prejudice grounds. See *Eisen*, 296 Mich App at 329.

III. MANDATORY SENTENCING

Defendant finally argues that his 25-year minimum sentence mandated by MCL 750.520b(2)(b) was cruel or unusual both facially and as applied to him. We disagree.

A. STANDARD OF REVIEW

Because defendant did not preserve this claim by raising the issue in the trial court, we review it for plain error affecting his substantial rights. *People v Burkett*, 337 Mich App 631, 635; 976 NW2d 864 (2021). However, the constitutionality of a statute is a question of law that we review de novo. *Id*.

B. CRUEL AND UNUSUAL PUNISHMENT REVIEW

The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishment." US Const, Am VIII. The Michigan Constitution more broadly prohibits "cruel or unusual punishment." Const 1963, art 1, § 16; *People v Taylor*, 510 Mich 112, 124 n 9; 987 NW2d 132 (2022). When assessing whether a punishment is cruel or unusual, this Court assesses the following factors: (1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation. *People v Bullock*, 440 Mich 15, 30, 33-34; 485 NW2d 866 (1992).

Defendant presents a facial and an as-applied challenge to the constitutionality of his sentence under MCL 750.520b(2)(b). "A facial challenge attacks the statute itself and requires the challenger to establish that no set of circumstances exists under which the [a]ct would be valid." *People v Johnson*, 336 Mich App 688, 695; 971 NW2d 692 (2021) (quotation marks and citation omitted; alteration in original). Whereas "[a]n as-applied constitutional challenge is based upon the particular facts surrounding defendant's conviction and sentence." *People v Adamowicz (On Second Remand)*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 330612); slip op at 9 n 10.

First, defendant concedes that binding precedent forecloses his facial challenge. See MCR 7.215(C)(2). Nonetheless, defendant presents this issue to preserve it for review by our Supreme Court. In *People v Benton*, 294 Mich App at 204-207, after addressing the *Bullock* factors, we held that the 25-year mandatory minimum sentence in MCL 750.520b(2)(b) was not cruel or unusual. Because published caselaw holds that a 25-year mandatory sentence under MCL 750.520b(2)(b) is not facially cruel or unusual, we conclude that defendant did not demonstrate plain error affecting his substantial rights.

Second, defendant's as-applied challenge to his sentence also fails. He did not present unusual circumstances to overcome the presumption of proportionality. "Legislatively mandated sentences are presumptively proportional and presumptively valid." *Burkett*, 337 Mich App at 637 (quotation marks and citation omitted). "[A] proportionate sentence is not cruel or unusual." *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Burkett*, 337 Mich App at 637 (quotation marks and citation omitted).

Defendant only argues that his sentence was disproportionate because of his lack of criminal history. He does not address the *Bullock* factors or indicate how his lack of criminal history relates to these factors. A defendant may not simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Accordingly, we only address whether defendant raised sufficiently unusual circumstances to overcome the presumption of proportionality.

Defendant cites a graphical image of an "age-crime curve" for CSC offenders without explanation how the information applies to himself. Regardless, the seriousness of the offense is not lessened by defendant's lack of a criminal history. Previously, this Court explained that a defendant's lack of a criminal history is insufficient to overcome the presumption that his legislatively-mandated sentence was proportional. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Accordingly, no unusual circumstances overcome the presumption of proportionality in this case.

Affirmed.

/s/ Allie Greenleaf Maldonado
/s/ Kirsten Frank Kelly
/s/ James Robert Redford