STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2026 2:10 PM
v	No. 367672 Muskegon Circuit Court
LTJ UDELL, Defendant-Appellant.	LC No. 2019-000947-FC

Before: ACKERMAN, P.J., and REDFORD and FEENEY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (sexual penetration of a victim under 13 years of age by a defendant 17 or older), and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b) (sexual contact with a victim under 13 by a defendant 17 or older).[1] The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 25 to 50 years' imprisonment for each CSC-I conviction and 19 months to 30 years for each CSC-II conviction. We affirm defendant's convictions and the CSC-I sentences, but we vacate the CSC-II sentences and remand for corrections to the presentence investigation report (PSIR) and for resentencing.

I. FACTS

This case arises out of the victim's disclosure that defendant sexually abused him on four occasions. In 2015, the victim's mother, Melissa Wei, was diagnosed with multiple sclerosis; shortly thereafter, defendant and his wife, along with their daughter, moved into Wei's home on Auble Road and became her paid caregivers. Wei testified that defendant and his wife helped care for her children and assisted with running errands because she could not drive. She explained that

[1] Defendant was initially tried in 2021, resulting in a hung jury. On retrial, one count of CSC-I (Count 1) was dismissed. The remaining CSC-I charges were presented as Counts 2 and 4, while the CSC-II charges were presented as Counts 3 and 5.

defendant used to take her son, the victim, to the store by himself, but she did not find it unusual at the time because defendant was the victim's godfather, and he was "trying to be like a dad" to her kids. In 2017, the victim's family moved in with Wei's parents, and defendant's family moved into a motel. During that transition, Wei rented a storage unit and gave defendant a key to the unit because he was helping her move. The families remained in contact until the victim disclosed the allegations of abuse giving rise to this case.

In September 2017, the victim, who was then in fifth grade, attended a "good touch-bad touch program" at his school that was led by the Children's Advocacy Center. The next day, the victim asked to speak with his school counselor and told the counselor that he had been sexually molested multiple times by someone living in his home.

As to Count 2, the victim, who was 15 years old at the time of trial, testified that an instance of abuse occurred when he and defendant were at the Auble Road home alone. The victim explained that, while remaining clothed, defendant (1) turned the stereo volume up, (2) told the victim to take his clothes off, (3) sat on the couch, (4) had the victim stand on the couch, and (5) "put his mouth on" the victim's penis.

As to Count 3, the victim testified that another instance of abuse occurred in defendant's bedroom when no one else was around. Defendant told the victim that he was "going to hump" him. Defendant then asked whether the victim would like his clothes on or off, and the victim stated that he wanted them on. While fully clothed, defendant proceeded to place his penis on the victim's butt and move forward and backward at his waist. The victim explained that he did not see defendant's penis, but he could feel it through his clothes.[2]

As to Count 4, the victim testified that another instance of abuse occurred at a public storage unit. The victim explained that defendant drove him to the storage unit, and after they finished unloading the items that they brought, defendant "backed the [vehicle] into the storage unit, shut the storage unit door, turned on the light in the car[,] and asked [the victim] to suck on his penis." The victim testified that while he was "sucking" on defendant's penis, defendant "released semen" into his mouth. Afterward, defendant gave the victim a piece of gum and a napkin to spit the semen out, and then he drove the vehicle out of the storage unit.

As to Count 5, the victim testified that another instance of abuse occurred in a vehicle. The victim explained that on that date, defendant drove the victim from the Auble Road home to Wesco to buy cigarettes. On the way, defendant told the victim to pull down his pants, and after the victim complied, defendant rubbed the victim's penis with his hand.

On cross-examination, the victim testified to one more uncharged instance of abuse, stating that an incident occurred at defendant's motel. Defendant had the victim "place his mouth on" defendant's penis, and defendant "released semen."

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[2] Although it is not completely clear whether the following occurred during the same instance of abuse, the victim further testified that defendant threatened him with a knife, telling the victim that he would kill him if he told anyone about the sexual abuse.

To demonstrate that defendant lacked the opportunity to commit the alleged offenses, defense counsel introduced multiple exhibits outlining the two families' general schedules during the time that the allegations took place. Defendant's wife and daughter also testified that they could hear everything from one side of the Auble Road home to the other. Defendant's wife further testified that (1) defendant and the victim "[a]lmost never" went places by themselves, (2) she did not remember a time that defendant and the victim were home alone, and (3) she was present the only time that the victim visited their motel.

The jury found defendant guilty, and the trial court sentenced defendant as stated earlier. Defendant then moved the trial court for a directed verdict on Counts 2, 4, and 5 and for a new trial on Count 3, raising the same arguments he presents on appeal. The trial court denied relief on Counts 2, 4, and 5; however, it determined that a *Ginther*[3] hearing was necessary to investigate defendant's claims of ineffective assistance of counsel. After holding a *Ginther* hearing, the trial court entered a written opinion and order denying defendant's motion for a new trial. Defendant now appeals.

II. INSUFFICIENT EVIDENCE—PENETRATION—COUNT 2

Defendant first argues that there was insufficient evidence to prove penetration as to Count 2. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

A defendant need not take any "special steps" to preserve a challenge to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We review de novo a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kenny*, 332 Mich App 394, 402-403; 956 NW2d 562 (2020). "But more importantly, '[t]he standard of review is deferential: a reviewing court is *required* to draw all reasonable inferences and make credibility choices in support of the jury verdict.' " *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (alteration in original). The prosecution is not required to disprove every reasonable theory of a defendant's innocence; it "need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant." *Kenny*, 332 Mich App at 403.

B. ANALYSIS

"[D]ue process requires the prosecution to prove every element beyond a reasonable doubt." *Oros*, 502 Mich at 239 n 3. Count 2 charged defendant with CSC-I contrary to MCL 750.520b(2)(b), which provides that an offender is guilty of CSC-I if the offender sexually penetrated a person who was less than 13 years old, and the offender was 17 years of age or older. On appeal, defendant asserts that the victim's testimony—that defendant "put his mouth on" the

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

victim's penis—was insufficient to establish the penetration element. Defendant does not challenge the sufficiency of the evidence concerning the remaining elements.

Under MCL 750.520a(r), "sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body." In *People v Johnson*, 164 Mich App 634, 640-641; 418 NW2d 117 (1987) (*Johnson I*), rev'd 432 Mich 931 (1989) (*Johnson II*), a panel of this Court affirmed a penetrative-CSC conviction based on an alleged act of fellatio where the victim testified that the defendant had "kissed" the victim's penis. The majority reasoned that "fellatio" should be given its ordinary dictionary meaning—"oral stimulation of the penis"—and that kissing satisfied that definition. *Johnson I*, 164 Mich App at 640-641.

In dissent, Judge KELLY contended that the majority's approach impermissibly substituted a lay definition of "fellatio" for the controlling statutory requirement of an "intrusion, however slight," MCL 750.520a(r). Judge KELLY reasoned that oral stimulation or contact does not establish the penetration element unless there is some intrusion of the penis into the mouth, and that the "kissing" testimony was therefore insufficient to establish penetration. *Johnson I*, 164 Mich App at 646-648 (KELLY, J., dissenting). The defendant then sought leave to appeal and, in lieu of granting leave, our Supreme Court reversed this Court's opinion and the defendant's conviction "for the reasons stated by Judge KELLY in his dissent." *Johnson II*, 432 Mich at 931.

In this case, the victim testified about an incident in which defendant instructed him to stand naked on the couch while defendant sat in front of him. The victim stated that defendant "sort of put his mouth on my private area," later clarifying that his "private area" meant his penis. The prosecution asked, "So the defendant placed his mouth on your penis?" The victim responded affirmatively.

Relying on *Johnson*, defendant asserts that the victim's testimony was insufficient to establish the penetration element of CSC-I. We disagree. Testimony that defendant put his mouth "on" the victim's penis permitted a rational juror to infer that the victim's penis penetrated defendant's mouth, however slightly. That testimony differs from the testimony in *Johnson*. The word "kissed," standing alone, did not establish any intrusion into the mouth. By contrast, the victim's description here reasonably conveyed that defendant placed his mouth over or around the victim's penis.

The victim's description of the uncharged motel incident and the storage unit incident further support that understanding of the testimony. In describing that incident, the victim stated that defendant had him "place his mouth on" defendant's penis and that defendant "released semen." Additionally, in describing the storage unit incident, the victim said that he "sucked *on*" defendant's penis and that semen was released into the victim's mouth. This reinforces the conclusion that when the victim used the preposition "on" in the context of the storage unit incident, he meant that his mouth was "around" defendant's penis. The victim thus used materially similar language in describing conduct that, viewed in context, reasonably permitted an inference of oral penetration rather than merely an external kiss. A rational juror could understand the victim to have used the phrase "put" or "place his mouth *on*" in the same manner when describing Count 2.

It is true that the victim's testimony could also support an inference that defendant merely kissed or licked the victim's penis. But in reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution, *Kenny*, 332 Mich App at 402-403, and we are "*required* to draw all reasonable inferences . . . in support of the jury verdict," *Oros*, 502 Mich at 239 (citation omitted). Viewing the evidence under that standard, the victim's testimony was sufficient to establish the penetration element of CSC-I.

III. INEFFECTIVE ASSISTANCE

Defendant further argues that defense counsel rendered ineffective assistance in several respects. None of defendant's claims warrant relief.

A. PRESERVATION AND STANDARD OF REVIEW

Because defendant raised these ineffective assistance claims in a motion for a new trial or evidentiary hearing filed in the trial court, they are preserved for appellate review. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). "The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008) (quotation marks and citation omitted), amended 481 Mich 1201 (2008).

B. LEGAL STANDARD

In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court established a two-prong test that a defendant must meet to prove that his or her counsel's assistance was so defective as to require a new trial. The test is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Id*.]

Stated more simply, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. To show that counsel's performance was deficient, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

Because there are countless ways to provide effective assistance in a given case, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 689 (quotation marks and citation omitted). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012) (quotation marks and citation omitted), vacated in part on other grounds 493 Mich 864 (2012).

C. ANALYSIS

Defense counsel's performance was not deficient, and even if it were, defendant has not shown that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

1. DEFENSE COUNSEL'S QUESTIONING REGARDING THE UNCHARGED ACT

Defendant first argues that defense counsel erred by questioning the victim about the uncharged incident at a motel. We disagree.

On cross-examination, defense counsel asked whether the victim "missed one accusation" because the last time he testified, he mentioned an incident that occurred in a motel room. The victim responded, "Oh, yes . . . . I apologize. I forgot about that." The victim explained that there was an incident at defendant's motel, where defendant had the victim "place his mouth on" defendant's penis, and defendant "released semen."

At the *Ginther* hearing, defense counsel explained that he questioned the victim about the motel incident because he wanted to highlight the inconsistencies in the victim's disclosures, and he knew that defendant's wife was going to testify that the victim and defendant were never alone at the motel.[4] Defense counsel acknowledged that the motel disclosure was listed in a police report, but he explained that the victim's disclosure to the police, followed by his subsequent failure to recall the incident at trial, suggested that the disclosure was fabricated. Defense counsel further explained that challenging the victim's truthfulness was the most effective argument to present to the jury. Accordingly, one of counsel's strategic decisions was to present evidence that the victim had previously disclosed another incident of abuse that the victim later forgot, and that the victim had never been alone with defendant at the location of the alleged incident. By calling the reliability of that disclosure into question, defense counsel also called the veracity of the victim's other disclosures into question.

Defendant argues that defense counsel's strategy was unreasonable considering that the victim's credibility could be bolstered by a police report noting the disclosure. But defense counsel's questioning accounted for the fact that the victim had previously disclosed the incident. Accordingly, defense counsel was not trying to prove that the disclosure was never made; instead,

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[4] Indeed, defendant's wife testified that she was present the only time that the victim visited the motel.

he was trying to show that the victim's disclosure regarding that incident—and, in turn, the other incidents—was unreliable.

Because defense counsel's questioning was consistent with his overall trial strategy, and because his questioning was not outside the wide range of professionally competent assistance, defendant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 US at 689 (quotation marks and citation omitted). Accordingly, defense counsel's performance was not deficient in this regard. See *id*. at 690.

2. CONFLICT OF INTEREST

Defendant further argues that defense counsel had a conflict of interest in representing defendant because the Muskegon County Public Defender's Office—where defense counsel was employed—had recently served as the victim's guardian ad litem (GAL) in a family court case. Defendant asserts that "[t]he risk that [defense counsel] did not attempt to use the information from the [victim's previous] GAL files because he was ethically prevented from doing so is substantially too high in this case to have confidence in the verdict." Accordingly, defense counsel's strategy—proving that defendant and the victim were never alone together—was grossly unreasonable considering that he was in possession of records showing that the victim had long-standing emotional and environmental issues. We conclude that any conflict of interest did not adversely affect defense counsel's performance.

To prove ineffective assistance in this regard, a defendant must establish that "an actual conflict of interest adversely affected his lawyer's performance." *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998) (quotation marks and citation omitted). In this case, even assuming that an actual conflict of interest existed,[5] defendant has failed to show that the alleged conflict adversely affected defense counsel's performance. See *id*.

Importantly, defense counsel testified that he did not believe his representation was limited in any way. Defense counsel explained that he believed the most effective argument to present concerned the victim's untruthfulness, and he "wanted to be as clean and forthright" with that argument as possible because he did not want to distract the jury with other arguments. Therefore, defense counsel purposefully chose not to muddy the waters with information from the GAL files—such as information regarding Wei's emotional abuse toward the children and dysfunctional sexual behavior in front of the children—in an effort to present one "core argument" for the jury

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[5] It appears that no one from the Muskegon County Public Defender's Office, including defense counsel, should have represented defendant in this matter considering their prior representation of the victim. See MRPC 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by" MRPC 1.7); MRPC 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client.").

to focus on.[6] Defense counsel's trial-strategy explanation is supported by the fact that he could have introduced evidence of Wei's behavior through defendant's wife's testimony,[7] without even broaching the GAL files, but he chose not to do so.

Accordingly, contrary to defendant's assertions on appeal, defense counsel testified that the conflict did not influence his decisions regarding what evidence to produce. Instead, he made strategic choices in selecting the evidence and arguments to present. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 US at 689. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Defendant has failed to establish that defense counsel "lessened his defense" because of the alleged conflict or that any conflict otherwise adversely affected counsel's performance. *Smith*, 456 Mich at 558. Instead, the record reflects that counsel made strategic choices regarding the evidence and arguments to present. See *Strickland*, 466 US at 689-690. Defendant is therefore not entitled to relief on this issue.

3. DR. YVONNE REKENY'S TESTIMONY

Defendant argues that defense counsel was ineffective for failing to object to Dr. Rekeny's statement that the victim had a history of involuntarily soiling his pants with urine (enuresis) and feces (encopresis). We disagree.

Dr. Rekeny, a physician at the Muskegon County Children's Advocacy Center, was qualified as an expert in child sexual assault. Dr. Rekeny testified that the victim had a history of enuresis and encopresis "[i]n the past." On cross-examination, defense counsel asked Dr. Rekeny how long the victim had struggled with enuresis and encopresis, but Dr. Rekeny did not know. At the *Ginther* hearing, defense counsel testified that he: (1) could not recall why he did not object to Dr. Rekeny's testimony on direct examination, and (2) was aware that the victim's history of enuresis and encopresis predated the period when defendant lived with him.

"[T]here are times when it is better not to object and draw attention to an improper comment." *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008) (quotation marks and citation omitted). Because this testimony was brief, and because Dr. Rekeny did not testify that the victim's enuresis and encopresis resulted from defendant's sexual abuse, defense counsel may have believed that it was better not to draw the jury's attention to the victim's diagnosis. See *id*. Regardless, even if defense counsel erred by not objecting to this testimony, defendant has failed

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[6] The GAL files also apparently included a statement that the victim " 'has been lying a lot lately.' " Defense counsel testified that he was unaware of that statement because he unknowingly possessed a version of the GAL files that only included every other page. Accordingly, defense counsel's failure to introduce that evidence—which would have been directly relevant to his core strategy—was not because he was worried about his professional responsibility to protect the victim's information; rather, it was simply because he did not know that such a statement existed.

[7] Defendant and defendant's wife had discussed their observations of Wei's behavior with defense counsel.

to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. As previously stated, Dr. Rekeny's testimony regarding this diagnosis was very brief, and she acknowledged that the victim's history of enuresis and encopresis was "[i]n the past." Moreover, there was no allegation that the diagnosis resulted from defendant's alleged actions.

4. WEI'S TESTIMONY

Defendant further argues that defense counsel was ineffective for failing to ask the trial court to revisit its limiting pretrial evidentiary ruling—regarding the contents of the victim's prior GAL files—after testimony concerning the victim's diagnoses of depression, post-traumatic stress disorder (PTSD), autism, and oppositional defiance disorder (ODD) was introduced. We disagree.

At trial, Wei testified that the victim was diagnosed with depression and PTSD. Wei explained that although the victim had previously been diagnosed with autism, he was later retested and found not to be autistic. On cross-examination, Wei admitted that the victim: (1) was also diagnosed with ODD, (2) "gets over angry," and (3) began seeing counselors before Wei knew about the allegations in this case.

At the *Ginther* hearing, defense counsel stated that he wanted to highlight the victim's lack of truthfulness by drawing attention to the victim's reactive attachment disorder (RAD) diagnosis—which included his ODD diagnosis—and contradictory statements. Although evidence of the victim's ODD diagnosis was admitted on cross-examination, defense counsel explained that evidence of the victim's RAD diagnosis was not admitted because of the trial court's limiting evidentiary ruling. Defense counsel testified that although he had initially considered an interlocutory appeal regarding the trial court's limiting evidentiary ruling, he ultimately did not file one because he believed that he had a defense that would be successful, and he believed defendant needed the trial to occur expeditiously because he "was under severe financial constraints."[8] Defense counsel also acknowledged, however, that he did not consider asking the trial court to reconsider its evidentiary ruling during trial.

Because counsel did not consider seeking reconsideration during trial, his failure to do so cannot itself be characterized as a strategic decision. Nevertheless, defendant has not established that the omission fell outside the wide range of professionally competent assistance or affected the outcome of the trial. Through his cross-examination of Wei, counsel elicited testimony that the victim (1) had been diagnosed with ODD, (2) "gets over angry," and (3) had received counseling before Wei learned of the allegations in this case. Counsel also elicited testimony that the victim

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[8] Defendant's wife testified that although her family was living in a motel at that time, the family was not experiencing financial difficulties. Regardless of counsel's apparent belief that defendant was experiencing financial constraints, counsel also explained that he declined to pursue an interlocutory appeal because he believed that the defense he intended to present would be successful. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 US at 689. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Matuszak*, 263 Mich App at 61.

had previously fabricated a story that his father had died in the military. Thus, counsel vigorously pursued his "core argument" that the victim's allegations were not credible. Defendant has not shown a reasonable probability that, had counsel asked the trial court to revisit its ruling, the result of the proceeding would have been different.

Because defense counsel's questioning was consistent with his overall trial strategy, and because his questioning was not outside the wide range of professionally competent assistance, defendant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 US at 689 (quotation marks and citation omitted). Accordingly, defense counsel's performance was not deficient in this regard. See *id*. at 690.

5. ERECTILE DYSFUNCTION EVIDENCE

Defendant further argues that defense counsel's decision not to present evidence of defendant's erectile dysfunction did not constitute reasonable strategy. We disagree.

Defense counsel raised the issue of defendant's erectile dysfunction at defendant's first trial, but not at his second trial. At the *Ginther* hearing, defense counsel explained that he did not want to introduce this issue via an expert witness because he did not want the prosecutor to question that expert on whether someone with erectile dysfunction may be able to get an erection consistent with the victim's allegations if he was sexually interested in children rather than adult women. He further explained that he did not want to introduce this issue via defendant's wife because she would face the same questioning by the prosecutor, and he did not want her to be distracted and undermined when she was carrying the burden of the defense. Defense counsel also stated that because raising this issue did not work in the first trial, he decided to "concentrate on showing [that defendant] couldn't have done it as opposed to trying to show that he had erectile dysfunction." Defense counsel explained that after the first trial resulted in a mistrial, a juror had informed him that "the jury did not approve of the erectile dysfunction argument. They didn't believe it." Accordingly, defense counsel thought that he might get a better outcome if he omitted that evidence at the retrial.

Defense counsel's decision to omit this evidence was therefore intentional and strategic. Because this decision was not outside the wide range of professionally competent assistance, defendant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 689 (quotation marks and citation omitted). Accordingly, defense counsel's performance was not deficient in this regard. See *id*. at 690.

6. PRIOR STATEMENTS AND HEARSAY

Defendant further argues that defense counsel was ineffective for failing to object to inadmissible hearsay statements. We disagree.

Pertinent to this issue, MRE 801(d) declares that a statement is not hearsay if it meets the following conditions:

> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]

On appeal, defendant specifically argues that the first forensic interviewer's testimony—stating that the victim told her that he had experienced sexual abuse by defendant "too many times to count"—constituted inadmissible hearsay because no prior inconsistent statement had been made regarding the number of times that the alleged abuse occurred. See MRE 801(d)(1)(A). Defendant also argues that the testimony of the second forensic interviewer and the police officer—recounting the victim's pretrial disclosures of the storage-unit allegation—constituted inadmissible hearsay because: (1) no prior inconsistent statement had been made regarding that allegation, see MRE 801(d)(1)(A); and (2) defense counsel's strategy was that the victim initially, not recently, fabricated his allegations, see MRE 801(d)(1)(B).

Although defendant's appellate arguments concerning this issue were also raised in his posttrial motion for a new trial, the only hearsay statements that defense counsel was questioned about at the *Ginther* hearing concerned the forensic interviewers' identification of defendant as the perpetrator. In that regard, defense counsel explained that even though he agreed that those statements constituted inadmissible hearsay, he strategically chose not to object to them because he did not want to "amplify," or draw attention to, testimony that merely recounted an issue already in the record. Defense counsel explained that his trial strategy was to show that regardless of the number of people to whom the victim had disclosed the allegations, defendant did not have the opportunity to do what the victim accused him of because they were not alone at the times and locations of the alleged offenses.

Therefore, regardless of whether the challenged statements were excluded from the definition of hearsay under MRE 801(d)(1)(A) or (B), defense counsel's *Ginther* hearing testimony reflects that he made strategic choices about which testimony to challenge and, consequently, which testimony to "amplify" or draw to the jury's attention. Defense counsel's strategy rested on the theory that the victim's allegations were fabricated and could not have occurred. Counsel was therefore less concerned with how often the victim repeated the allegations than with whether the allegations themselves were credible. The challenged statements were brief and merely repeated matters about which the victim had testified; they did not include any opinion concerning the victim's credibility. Cf. *People v Douglas*, 496 Mich 557, 583-588; 852 NW2d 587 (2014). Accordingly, defense counsel's decision not to object was intentional and strategic.

Because this decision was not outside the wide range of professionally competent assistance, defendant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 US at 689 (quotation marks and citation omitted). Accordingly, defense counsel's performance was not deficient in this regard. See *id*. at 690.

7. THE PROSECUTOR'S CLOSING ARGUMENT

Defendant further contends that the prosecution mischaracterized the victim's testimony regarding Count 2 when the prosecutor argued in closing that defendant "placed [the victim's] penis in his mouth," and he submits that defense counsel was ineffective for failing to object to the mischaracterization.

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (cleaned up). While a prosecutor "may not argue facts not in evidence or mischaracterize the evidence presented," *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), prosecutors "are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *Bahoda*, 448 Mich at 282 (cleaned up).

As we explained in our resolution of defendant's sufficiency challenge as to Count 2, the victim's testimony that defendant "put his mouth on" the victim's penis gave rise to a reasonable inference that the victim's penis penetrated defendant's mouth, however slightly. Accordingly, the prosecutor's argument that defendant "placed [the victim's] penis in his mouth" was a permissible inference supported by the evidence. Any objection by defense counsel would therefore have been futile, and "[c]ounsel is not ineffective for declining to raise a futile objection." *People v Muniz*, 343 Mich App 437, 449; 997 NW2d 325 (2022).

Even assuming for the sake of argument that the remark was improper, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, thereby curing any potential prejudice. See *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011) (holding that a prosecutor's erroneous closing argument does not require reversal when "the trial court clearly instructed the jury that '[t]he lawyer[s'] statements and arguments are not evidence' "); see also *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."). Defendant therefore has not established that counsel's failure to object to the prosecutor's closing argument fell below an objective standard of reasonableness or caused him any prejudice.

8. FORENSIC INTERVIEW PROCESS

Defendant further argues that defense counsel was ineffective for failing to object to irrelevant evidence about the forensic interview process. We disagree.

In this case, both forensic interviewers testified about how forensic interviews are conducted, including that interviewers are trained to avoid suggestive questions. At the *Ginther* hearing, defense counsel explained that his strategy for handling the forensic interviewers was to attack their conclusions and "then get them out of there as quick[ly]" as possible. Accordingly, defense counsel made an intentional, strategic decision not to draw too much attention to the forensic interviewers' testimony.

Because this decision was not outside the wide range of professionally competent assistance, defendant has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 US at 689 (quotation marks and citation omitted). Accordingly, defense counsel's performance was not deficient in this regard. See *id*. at 690.

IV. INSUFFICIENT EVIDENCE—VENUE—COUNTS 4 AND 5

Defendant further argues that there was insufficient evidence to prove venue as to Counts 4 and 5, and defense counsel was ineffective for failing to raise that issue before the case was submitted to the jury. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

A defendant does not need to take any "special steps" to preserve a challenge to the sufficiency of the evidence. *Hawkins*, 245 Mich App at 457. But to preserve an issue regarding venue, a defendant must bring a challenge to the prosecution's proof of venue before the case is submitted to the jury. See MCL 767.45(1)(c) ("No verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury"); *People v Williams*, 1 Mich App 441, 443; 136 NW2d 774 (1965) ("Failure to establish venue is a matter to be preserved at trial. Defendant raised no objection at that time and will not be permitted to do so on appeal."). In this case, defendant failed to raise any challenge regarding venue before the case was submitted to the jury. Nonetheless, because defendant raised his accompanying claim of ineffective assistance in a motion for a new trial or evidentiary hearing filed in the trial court, that issue is preserved for appellate review. See *Sabin*, 242 Mich App at 658.

B. ANALYSIS

Although venue is not an essential element of a crime, it must be proven beyond a reasonable doubt, and the determination regarding venue presents a factual issue for the jury. *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009).

In this case, defendant moved the trial court for a postjudgment directed verdict on Counts 4 and 5 on the basis that venue was not established. But because defendant failed to raise this issue before the case was submitted to the jury, he is not entitled to relief. See MCL 767.45(1)(c); *Williams*, 1 Mich App at 443. Nonetheless, defendant argues that defense counsel was ineffective for failing to raise this issue before the case was submitted to the jury. Accordingly, defendant may obtain relief if he can show that, but for counsel's failure to challenge the sufficiency of the prosecution's proof of venue, there is a reasonable probability that the result of the proceeding would have been different. See *Strickland*, 466 US at 687, 694; see, e.g., *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, January 14, 2003 (Docket No. 236550), p 2.[9]

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[9] "Although unpublished opinions are not binding, we may consider the rationale contained in an unpublished opinion to be persuasive." *People v Brown*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 359376); slip op at 9 n 14.

Regarding Count 4, the evidence established that an incident of abuse occurred at a storage unit that Wei rented "on Brooks Road" and to which defendant had a key. When shown a photograph of the storage unit, the victim testified, "I cannot recall if that is definitely the same storage unit, but it looks very similar." Wei subsequently identified the photograph as depicting her storage unit. Because the record established that the Brooks Road facility was located in Muskegon County, a rational trier of fact could find beyond a reasonable doubt that the offense underlying Count 4 occurred in Muskegon County.

Regarding Count 5, the evidence established that an incident of abuse occurred in a vehicle as defendant and the victim were driving from the Auble Road home to Wesco. The victim testified that defendant was making the drive to pick up cigarettes; defendant's wife testified that defendant was a smoker and that there was a Wesco "[a] couple miles away" from the Auble Road home. Again, there was no evidence presented indicating that the vehicle was *not* in Muskegon County, and defendant has failed to present any such argument on appeal aside from merely stating that Wesco has multiple locations. Accordingly, a rational trier of fact could reasonably determine that venue was proper, i.e., that the vehicle was in Muskegon County, between the Auble Road home and the Wesco that was "[a] couple miles away."

Because defendant has failed to show there is a reasonable probability that the result of the proceeding would have been different had defense counsel objected to venue before this case was submitted to the jury, he is not entitled to relief on this issue. See *Strickland*, 466 US at 687, 694.

V. SENTENCING—OV 11

Defendant further argues that the trial court erred by assigning 50 points for OV 11. We agree.

A. STANDARD OF REVIEW

Because defense counsel opposed the assignment of 50 points for OV 11 at sentencing, this issue is preserved for appellate review. See *People v Ventour*, 349 Mich App 417, 433; 27 NW3d 660 (2023). "When reviewing a trial court's scoring decision, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Baskerville*, 333 Mich App 276, 291; 963 NW2d 620 (2020) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. at 292 (quotation marks and citation omitted).

Because "a sentence is invalid if it is based on inaccurate information," a defendant is entitled to resentencing based on a scoring error if the error "altered the appropriate guidelines range." *People v Francisco*, 474 Mich 82, 90; 711 NW2d 44 (2006) (citation omitted). An error that does not alter the guidelines minimum range is harmless and does not require resentencing. *People v Teike*, 348 Mich App 520, 537; 19 NW3d 733 (2023).

B. ANALYSIS

OV 11 addresses criminal sexual penetrations. Under MCL 777.41, OV 11 should be assessed 50 points if "[t]wo or more criminal sexual penetrations occurred," 25 points if one penetration occurred, and zero points should be assessed if no penetrations occurred. MCL 777.41(1)(a)-(c). The statute directs the sentencing court to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense," MCL 777.41(2)(a), and to score penetrations "extending beyond the sentencing offense" under OV 12 or OV 13, MCL 777.41(2)(b). But, under MCL 777.41(2)(c), a sentencing court may not "score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense."

Our Supreme Court has construed the phrase "arising out of" to require "a causal connection between two events of a sort that is more than incidental"; the mere fact that penetrations involved the same offender and victim does not suffice. *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Thus, penetrations that happen in separate incidents, occurring on different occasions and at different locations, do not "arise out of" one another for purposes of scoring OV 11. *Id*. at 101-103.

Because the trial court in this case imposed concurrent sentences, it was only required to score the guidelines for the offenses in the highest crime class, i.e., the CSC-I convictions. See MCL 771.14(2)(e) and MCL 777.21(2). The PSIR is accompanied by a single sentencing information report pertaining to the CSC-I conviction for Count 2. That report and the sentencing transcript confirm that the trial court assessed 50 points for OV 11 based on the acts of penetration forming the basis of Counts 2 and 4.

The trial court erred in that assessment. The record here supports only one act of penetration arising out of Count 2: the penetration underlying that conviction. But the penetration forming the basis of a CSC-I conviction cannot be scored in assessing points for OV 11. MCL 777.41(2)(c). Accordingly, OV 11 should have been assessed zero points for Count 2.

Although the court was required to score the guidelines for "*each*" offense "having the highest crime class," MCL 777.21(2) (emphasis added) and MCL 771.14(2)(e)(*ii*), the record contains no sentencing information report for Count 4, the other CSC-I conviction. See *People v Reynolds*, 508 Mich 388, 396; 975 NW2d 821 (2021) ("[W]hen two or more offenses fall within the same crime class and it is the highest applicable crime class, then not only must each offense be scored, but the defendant must also be sentenced based on the respective minimum sentencing guidelines range for each offense."). The same erroneous rationale underlying the court's assessment of OV 11 for Count 2 would likewise apply to the scoring of that variable for Count 4.

Notwithstanding the court's error in assessing OV 11, defendant is not entitled to resentencing with respect to Counts 2 and 4. Each of those convictions carried a mandatory minimum sentence of 25 years' imprisonment, MCL 750.520b(2)(b), and the trial court sentenced defendant consistent with its statutory obligations. Because the trial court lacked discretion to impose a lower minimum sentence as to Counts 2 and 4, the error in scoring OV 11 was harmless. See MCL 769.34(2)(a). Even if the error changed the guidelines range, the court could not have imposed a lesser sentence, so defendant is not entitled to resentencing on Counts 2 or 4.

Defendant is, however, entitled to accurate guidelines and an accurate PSIR because he has a right to be sentenced on, and to have the Department of Corrections receive, accurate information. *People v Maben*, 313 Mich App 545, 553; 884 NW2d 314 (2015). We therefore remand for the trial court to correct the sentencing information report for Count 2, prepare a sentencing information report for Count 4, score OV 11 consistent with MCL 777.41 and *Johnson*, 474 Mich 96, and correct the PSIR accordingly.

As noted, the trial court did not prepare—nor was it required to prepare—sentencing information reports for the CSC-II convictions because the court imposed concurrent sentences, and it was therefore only obligated to score the guidelines for the offenses belonging to the highest crime class. Accordingly, the absence of sentencing information reports for Counts 3 and 5 is not, standing alone, error.

The difficulty is that the record does not reveal how the trial court calculated the 19-month minimum sentences for Counts 3 and 5. If those sentences were determined by reference to an erroneous assessment of OV 11 or if those sentences were in some way tied to the erroneously scored guidelines for Count 2, then the CSC-II sentences were based on inaccurate information, entitling defendant to resentencing on those counts.[10] If, on the other hand, the CSC-II sentences were derived independently from the scoring error, defendant is entitled to no relief relative to Counts 3 and 5. Because no sentencing information report exists for those counts, we cannot ascertain the ranges on which the sentences rest, cannot confirm that the sentences were not predicated upon the erroneous assessment of OV 11, and cannot determine whether any error was harmless. We therefore vacate the sentences for Counts 3 and 5 and remand for preparation of sentencing information reports and for resentencing on those counts.

VI. CONCLUSION

We affirm defendant's convictions and his sentences for Counts 2 and 4, but we remand for correction of the sentencing information report as to Count 2 and for preparation of a sentencing information report as to Count 4. We vacate defendant's sentences for Counts 3 and 5, and we remand for preparation of sentencing information reports and resentencing on those counts. We do not retain jurisdiction.

/s/ Matthew S. Ackerman
/s/ James Robert Redford
/s/ Kathleen A. Feeney

[10] It is true that the lesser CSC-II sentences were imposed concurrent to, and are therefore subsumed by, the higher CSC-I sentences. But a concurrent sentence is not immunized from correction merely because it is subsumed by a longer term and so has "no practical effect." *People v Gunn*, 503 Mich 908 (2018).