

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CHRISTOPHER BUTLER,

Defendant-Appellant.

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UNPUBLISHED

September 28, 2026

2:00 PM

No. 370294

Genesee Circuit Court

LC No. 2023-051584-FC

Before: MARIANI, P.J., and FEENEY and TREBILCOCK, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for (1) felony murder, MCL 750.316(1)(b); (2) first-degree child abuse, MCL 750.136b(2); (3) concealing the death of an individual, MCL 333.2841(3); and (4) third-offense aggravated domestic violence, MCL 750.81a(2); MCL 750.81(5). The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to serve concurrent sentences of (1) life, (2) 50 to 75 years, (2) 25 to 50 years, and (4) 25 to 50 years in prison, respectively. We affirm.

I. FACTS

This case arises out of the death of defendant’s 16-month-old son, the victim.

On July 20, 2022, the victim was removed from his mother’s care and placed with defendant as a non-respondent parent; this occurred despite Child Protective Services (CPS) and Department of Health and Human Services (DHHS) workers recommending that it was contrary to the victim’s welfare to be placed with defendant who was already on Michigan’s central registry.<sup>1</sup> Defendant was instructed to bring the victim to his mother’s supervised visitation twice

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<sup>1</sup> Under MCL 722.627j(2), “[DHHS] must classify a confirmed case of methamphetamine production, confirmed serious abuse or neglect, confirmed sexual abuse, or confirmed sexual exploitation, as a central registry case.”

a week. He brought the victim to the first six scheduled visits,<sup>2</sup> but then he missed the August 10, 2022 and August 12, 2022 visits. After the first missed visit, DHHS began to search for defendant and the victim. On August 12, 2022, a CPS supervisor decided to “call in a new complaint” on defendant, which the trial court rejected. On August 15, 2022, DHHS filed an emergency petition to remove the victim from defendant’s care; unfortunately, the trial court declined to hear the petition as an emergency and ultimately scheduled the hearing for September 5, 2022—a date that the victim never lived to see.

Tonya Atwell testified that on August 25, 2022, she and her husband were sitting on their front porch when they noticed that a car was pulled off on the side of their rural, dirt road, and a man in a yellow jersey was looking into the ditch along the road. Atwell’s husband yelled at the man because they thought that he was “dumping an animal there.” The man got back into his car and drove away. Once he was gone, Atwell decided to take a closer look into the part of the ditch where the man was looking into the weeds. She discovered a “big blue comforter” and “something red,” so she returned home to get a rake to further investigate. Atwell explained as follows:

I like used the rake to get down [into the ditch] and I realized that it was a shirt and the skull because I could see like cracks in the skull and the skin that had decomposed and it was like melted. And I had called my husband and told him and then I called 9-1-1 and got out of the ditch because I realized that it was a body.

The victim’s body “was in a very significant point of decomposition. His skull was in fragments . . . and then the rest of his remains were . . . very decomposed.” An expert in forensic anthropology examined the victim’s body and was able to identify ante-mortem trauma that showed signs of healing, peri-mortem trauma that occurred at or around the time of the victim’s death, and post-mortem damage that occurred after the victim’s death. Ante-mortem trauma was found in the form of fractures at the front of the victim’s skull and in three of the victim’s ribs; the ante-mortem skull trauma appeared to have been caused by “blunt force trauma,” and the ante-mortem rib trauma appeared to have been caused by “very strong” compression. The ante-mortem traumas occurred “weeks to months” before the victim’s death. Peri-mortem trauma was found in the form of six skull fractures, two of which broke all the way through the victim’s bone. The peri-mortem fractures appeared to have been caused by “blunt force trauma,” and it was possible that one blunt force impact created all six fractures. Post-mortem damage to the victim’s facial skeleton, rib, and lower body were also identified.

Because of the body’s varying stages of decomposition, experts were unable to obtain a blood sample from the victim; therefore, the tissue sample taken from the victim’s muscle was the only matrix that could be analyzed. An expert in medical toxicology testified that the “significantly elevated” amount of substances discovered in the victim’s muscle tissue—2,600 nanograms per gram of methamphetamine, 1,600 nanograms per gram of amphetamine, and the metabolite of the active component of cannabis—could not have been caused by passive exposure or breastmilk exposure. Instead, the levels indicated that the victim was most likely exposed to the substances through oral ingestion. The levels of methamphetamine in the victim’s body could kill someone,

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<sup>2</sup> The last time that CPS workers saw the victim was at the August 5, 2022 visitation.

but the expert could not conclude whether the methamphetamine found in the victim's body was "contributory or causative to his death." He clarified that the physical and mental effects that the substances would have on a 15- to 16-month-old child would not cause them to "run or punch anything so forcefully to break their cranium in six places."

After conferring with the other experts, the medical examiner determined that the victim's cause of death was "[b]lunt force head injuries and methamphetamine and cannabis intoxication, complicated by medical neglect." The exact date of the victim's death was never determined.<sup>3</sup>

On August 26, 2022, after seeing news about a small body being found just a mile and a half away from the house where defendant was staying, CPS reached out to the police investigators, and it was quickly determined that the body may belong to the victim. Defendant was taken into custody later that day, and a jersey—matching Atwell's description of the shirt that person looking into the ditch was wearing—was found amongst defendant's belongings.

Defendant participated in two police interviews. During the first interview, defendant insisted that CPS took the victim from him about two weeks prior. During his second interview, however, defendant eventually stated that the victim fell and hit his head. Defendant told the officers that he "thought he could save [the victim]" because he "didn't think he was that bad." Defendant explained that he wrapped the victim in a blanket and performed CPR on the victim, but when he could not revive the victim, he "freaked out" and put the victim's body in the ditch. But when defendant reiterated this story throughout the interview, he provided inconsistent locations and surfaces for the victim's fall. Similarly, in January 2023, defendant voluntarily provided a statement to a CPS ongoing worker about what happened, and once again, defendant's story changed regarding how the victim hit his head.

Other-act evidence was admitted in this case. In 2014, Jennifer Raleigh, a current DHHS worker and former CPS worker, investigated a case involving a 23-month-old child, KM, who had "sustained injuries to his head, face, cheek, forehead, meaning bruising, a contusion on his head, bruising on his left shoulder, a bruise in the middle of his back, right at his spine, and then scratches behind his ear and on his neck" when left alone in defendant's care. Defendant claimed that KM sustained the injuries from falling out of his crib; however, an expert in child abuse pediatrics diagnosed the injuries as abuse. After the incident involving KM, defendant was added to the central registry for the second time.<sup>4</sup>

Defendant was convicted and sentenced, as stated earlier. Defendant now appeals.

## II. ANONYMOUS JURY

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<sup>3</sup> An expert in forensic entomology testified that based on the colonization of blowflies in the body, the victim could have died on August 5th, 6th, or 7th. Similarly, a forensic anthropologist testified that the victim's death likely occurred two to four weeks prior to discovery.

<sup>4</sup> The record does not indicate why defendant was added to the central registry the first time.

On appeal, defendant argues that the trial court erred by referring to the jurors by their jury empanelment number, without a proper cautionary instruction. We disagree.

#### A. PRESERVATION AND STANDARD OF REVIEW

Defendant did not object to the trial court's referring to the jurors by numbers; therefore, this issue is not preserved. See *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007). Generally, a trial "court's decision to refer to jurors by number rather than name is a decision concerning the conduct of voir dire, which we . . . review for abuse of discretion." *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). But when the issue is not preserved, it is reviewed for plain error. *Hanks*, 276 Mich App at 92. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* If these requirements are satisfied, we must exercise our discretion and reverse only if the "forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and citation omitted).

#### B. ANALYSIS

"An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *Williams*, 241 Mich App at 522. "An anonymous jury implicates the following interests: (1) the defendant's interest in being able to conduct a meaningful examination of the jury[,] and (2) the defendant's interest in maintaining the presumption of innocence." *Hanks*, 276 Mich App at 93 (quotation marks and citation omitted). "A challenge to an 'anonymous jury' will only succeed where the record reflects that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised." *Id.*

In *Williams*, 241 Mich App at 523, the trial court referred to the jurors by numbers rather than by their names, but there was "nothing in the record to support the conclusion that any information was actually withheld from the parties." This Court determined that the jurors were not anonymous "in the strict sense of the term"—they were only anonymous "in the most literal sense; that is, their names were not read into the record." *Id.* (quotation marks and citation omitted). This Court explained that: (1) the defendant "had access to the jurors' biographical information, as contained in the juror questionnaires"; (2) "the voir dire conducted by both parties demonstrate[d] that the information was not withheld from the parties"; and (3) there was "nothing to indicate that [the] defendant's ability to effectively examine the venire was compromised in any way." *Id.* at 523-524. This Court further reasoned that

there [was] nothing in the record to indicate that the use of numbers undermined the presumption of innocence. There [was] no suggestion that jurors understood the use of numbers rather than names to be anything out of the ordinary. Thus, there was no suggestion that [the] defendant's trial was being handled in a special

way, with the resulting implication that he was generally dangerous or guilty as charged. [*Id.* at 524.]

Accordingly, this Court concluded that the “defendant’s due process rights were not violated by using juror numbers instead of names at trial.” *Id.* at 525.

In this case, the jurors were identified by numbers; however, defendant does not allege that any information about the jurors was withheld from the parties, and the record is clear that both parties conducted extensive voir dire. Like in *Hanks*, 276 Mich App at 94, “[t]here is no indication that any of the jurors believed that there was any significance in the use of numbers instead of names. Further, defendant failed to demonstrate that the use of numbers prevented him from conducting meaningful voir dire or that his presumption of innocence was compromised.” See also *Williams*, 241 Mich App at 524. In fact, the trial court repeatedly advised the jury that defendant was presumed innocent, and jurors are presumed to follow their instructions. *People v Urbanski*, 348 Mich App 90, 104; 17 NW3d 430 (2023).

Defendant argues that the trial court should have made a cautionary instruction, stating that its reference to the jurors’ numbers, rather than their names, was not a reflection of defendant’s potential guilt or dangerousness. This Court has “strongly urge[d] trial courts to advise the venire that any use of numbers in lieu of jurors’ names is simply for logistical purposes and they should not in any way consider it a negative against the defendant.” *Hanks*, 276 Mich App at 94. But such instruction is not strictly required. See *id.* at 94-95.

The jury in this case was anonymous only in a literal sense; therefore, none of the dangers of an “anonymous jury” were implicated, and defendant has failed to establish that plain error affected his substantial rights.<sup>5</sup> See, e.g., *Hanks*, 276 Mich App at 94; see also *Williams*, 241 Mich App at 523.

### III. OTHER-ACT EVIDENCE

Defendant further argues that the trial court erred by admitting other-act evidence, pursuant to MCL 768.27b. We disagree.

#### A. PRESERVATION AND STANDARD OF REVIEW

At trial, defendant objected to the admission of this evidence on the basis that it was too remote in time and too prejudicial. Therefore, defendant preserved those arguments for appeal. See *People v Buie*, 298 Mich App 50, 70; 825 NW2d 361 (2012). Defendant did not, however, argue that MCL 768.27b generally violates due process. Accordingly, this argument is not preserved. See *id.* at 70-71. “A trial court’s decision to admit evidence is reviewed for an abuse of discretion.” *Id.* at 71. But “when the decision regarding the admission of evidence involves a

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<sup>5</sup> Notably, the two cases that defendant primarily relies upon to support his argument—*United States v Sanchez*, 74 F3d 562 (CA 5, 1996) and *State v Tucker*, 259 Wis 2d 484; 2003 WI 12; 657 NW2d 374 (2003)—have already been deemed unpersuasive by this Court in *Hanks*, 276 Mich App at 94-95.

preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo.” *Id.* (quotation marks and citation omitted). “A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law.” *People v Propp*, 508 Mich 374, 383; 976 NW2d 1 (2021). “Unpreserved constitutional claims are reviewed for plain error.” *People v Hughes*, 506 Mich 512, 523; 958 NW2d 98 (2020).

## B. LEGAL STANDARDS

“Under MRE 404(b), the prosecution may not present evidence of a defendant’s other crimes, wrongs, or acts in order to show a defendant’s propensity to commit a crime.” *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). “Notwithstanding this prohibition, however, in cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant’s character or propensity to commit the same act.” *Id.* at 219-220. MCL 768.27b(1) provides, in relevant part, as follows:

Except as provided in [MCL768.27b(4), concerning acts occurring more than 10 years before the charged offense], in a criminal action in which the defendant is accused of an offense involving domestic violence . . . evidence of the defendant’s commission of other acts of domestic violence . . . is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

“Domestic violence” is defined as an act—that is not an act of self-defense—that “caus[es] or attempt[s] to cause physical or mental harm to a family or household member.” MCL 768.27b(6)(a)(i).

“The statutory language and policy considerations of MCL 768.27b clearly demonstrate the Michigan Legislature’s intent to allow prior-bad-acts evidence to be introduced at trial as long as the evidence satisfies the ‘more probative than prejudicial’ balancing test of MRE 403 . . . .” *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011). MRE 403 states that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” “The ‘unfair prejudice’ language of MRE 403 refers to the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *Cameron*, 291 Mich App at 611 (quotation marks and citation omitted). The “admission of evidence is unfairly prejudicial when . . . the danger exists that marginally probative evidence will be given undue or preemptive weight by the jury.” *Id.* (quotation marks and citation omitted).

## C. APPLYING MCL 768.27b TO DEFENDANT’S PRIOR BAD ACTS

Raleigh testified that in 2014, she investigated a case involving KM, a 23-month-old child, who had “sustained injuries to his head, face, cheek, forehead, meaning bruising, a contusion on his head, bruising on his left shoulder, a bruise in the middle of his back, right at his spine, and then scratches behind his ear and on his neck” when left alone in defendant’s care. Defendant

claimed that KM sustained the injuries from falling out of his crib; however, an expert in child abuse pediatrics diagnosed the injuries as abuse.

The evidence involving KM: (1) clearly meets the definition of “domestic violence” under MCL 768.27b(6)(a)(i), (2) occurred within 10 years of the charged offense as required by MCL 768.27b(4), and (3) was highly relevant to show defendant’s tendency to assault a young child left in his care. MRE 403 did not preclude admission of this evidence because its presentation was brief and not nearly as graphic or violent as the presentation of evidence regarding the charged offenses. See, e.g., *Railer*, 288 Mich App at 220. Defendant argues that the prejudice was compounded by the prosecutor’s closing arguments, in which the prosecutor reiterated the other-act evidence and stated that there was “[a] pattern. Injuring a child, giving an explanation not consistent.” But, again, the prosecutor’s remarks were brief and not graphic.

Additionally, the trial court minimized the evidence’s prejudicial effect by instructing the jury that it was not to consider the other-act evidence unless it found that “[d]efendant actually committed the act.” See *Cameron*, 291 Mich App at 612. The court further instructed the jury that it “must not convict the defendant in this case solely because [it] think[s] he’s guilty of other bad conduct.” Instead, “[t]he evidence must convince [the jury] beyond a reasonable doubt that the defendant committed the offense for which he’s on trial now, or [the jury] must find him not guilty.”

Moreover, any prejudicial effect of the trial court’s decision to admit the other-act evidence did not substantially outweigh the evidence’s probative value. “A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible.” *Id.* In this case, the trial court found that defendant’s prior actions were relevant to show intent; an absence of mistake; a scheme, plan, or method; “or doing things namely that when he is placed in charge of a child’s care[,] abuse and injury follows.” Therefore, the trial court determined that even though the evidence was prejudicial, it was not more prejudicial than probative. We agree.

Accordingly, the trial court did not err by admitting the other-act evidence, pursuant to MCL 768.27b, because the evidence was relevant, and any prejudicial effect did not substantially outweigh the evidence’s probative value.

#### D. CONSTITUTIONAL CHALLENGE

Defendant further argues that MCL 768.27b generally violates due process by permitting the introduction of propensity evidence in criminal trials.

In *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), the Michigan Supreme Court considered a constitutional challenge to MCL 768.27a, which permits the admission of a prior sexual offense involving a minor “for its bearing on any matter to which it is relevant,” MCL 768.27a(1). The Supreme Court concluded that “MCL 768.27a irreconcilably conflicts with MRE 404(b)”; however, “the statute prevails over the court rule because it does not impermissibly infringe on this Court’s authority regarding rules of practice and procedure under Const 1963, art 6, § 5.” *Id.* at 455-456. The Court explained that “statutory rules of evidence that reflect policy considerations ‘over and beyond matters involving the orderly dispatch of judicial business’ are

substantive, and in the case of a conflict with a court rule, the legislative enactment prevails.” *Id.* at 474.

A few months later, in *People v Mack*, 493 Mich 1, 2; 825 NW2d 541 (2012), the Michigan Supreme Court considered whether MCL 768.27b infringed upon the Supreme Court’s authority to establish rules of practice and procedure under the Michigan Constitution. Adopting its reasoning in *Watkins*, the Court concluded that MCL 768.27b did not infringe on the Supreme Court’s authority. *Id.* at 3. Moreover, in *Propp*, 508 Mich at 384, citing *Mack*, 493 Mich at 2, the Supreme Court reiterated that “MCL 768.27b ‘in certain instances expands the admissibility of domestic-violence other-acts evidence beyond the scope permitted by MRE 404(b)(1) . . . .’”

Accordingly, defendant is correct that MCL 768.27b generally permits the admission of propensity evidence in a manner that MRE 404(b) otherwise would not. Our Supreme Court, however, has upheld the Legislature’s authority to effectuate that policy judgment through MCL 768.27b, and while defendant has expressed his disagreement with the Legislature’s judgment in that regard, he has failed to meaningfully explain or substantiate how that disagreement amounts to a violation of his rights to due process. See *People v Beck*, 510 Mich 1, 26; 987 NW2d 1 (2022) (“It is not enough for an appellant simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims and then search for authority either to sustain or reject his position.”) (quotation marks, citation, and ellipses omitted). Therefore, defendant’s assertion that MCL 768.27b violates due process lacks merit.

#### IV. PROSECUTORIAL ERROR—INEFFECTIVE ASSISTANCE

Defendant further argues that the prosecutor: (1) appealed to the jury to draw negative inferences from defendant’s exercise of his right to trial, and (2) improperly elicited evidence of uncharged crimes that were not part of the MRE 404(b) and MCL 768.27b notice. Alternatively, defense counsel was ineffective for failing to object to those errors. We disagree.

##### A. PRESERVATION AND STANDARD OF REVIEW

“To preserve a claim of prosecutorial misconduct, the defendant must make a timely and specific objection to the conduct at trial.” *People v Clark*, 330 Mich App 392, 433; 948 NW2d 604 (2019). Because defendant failed to object to any of the prosecutor’s alleged errors, he did not preserve these claims for appellate review. See *id.* “Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights.” *Id.*

A defendant can preserve a claim of ineffective assistance of counsel by raising the issue in a motion for a new trial or evidentiary hearing filed in the trial court, *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000), or in a motion to remand for an evidentiary hearing filed in this Court, *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020). Because defendant did not raise his alternative ineffective-assistance-of-counsel claims in the trial court or in a motion to remand or for an evidentiary hearing in this Court, they are not preserved for appellate review. See *Abcumby-Blair*, 335 Mich App at 227; *Sabin*, 242 Mich App at 658. “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). But when a claim of ineffective assistance of counsel is not preserved, “our review is limited to errors apparent on the record.” *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

## B. LEGAL STANDARDS

“Generally, to prevail on a claim of prosecutorial misconduct,<sup>[6]</sup> a defendant must show that he was denied a fair and impartial trial.” *People v Solloway*, 316 Mich App 174, 201; 891 NW2d 255 (2016). “A prosecutor can deny a defendant his or her right to a fair trial by making improper remarks that so infect the trial with unfairness as to make the resulting conviction a denial of due process.” *People v Lane*, 308 Mich App 38, 62; 862 NW2d 446 (2014) (quotation marks and citation omitted). “We must evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor’s comments in context and in light of the defendant’s arguments.” *Id.* at 62-63. “Generally, prosecutors are accorded great latitude regarding their arguments, and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case.” *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). “A defendant is entitled to a fair trial, not a perfect one.” *Solloway*, 316 Mich App at 201.

“To succeed on an ineffective-assistance-of-counsel argument, 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.” *People v Hughes*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW3d \_\_\_ (2025) (Docket No. 367172); slip op at 3 (quotation marks and citation omitted). “In examining whether defense counsel’s performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel’s performance was born from a sound trial strategy.” *Id.* (quotation marks and citation omitted). “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.” *Id.* (quotation marks and citation omitted). “This Court will not substitute its own judgment for that of counsel or use the benefit of hindsight in assessing defense counsel’s competence.” *Id.* “The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.* (quotation marks and citation omitted).

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<sup>6</sup> The term “prosecutorial error” is more appropriate than the term “prosecutorial misconduct” in this case. See *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015) (“Although we recognize that the phrase ‘prosecutorial misconduct’ has become a term of art in criminal appeals, we agree that the term ‘misconduct’ is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor’s conduct violates the rules of professional conduct or constitutes illegal conduct.”) (citations omitted).

### C. THE PROSECUTOR'S OPENING STATEMENT

Defendant first argues that he was denied his due process right to a fair trial by the prosecutor's misconduct in drawing negative inferences from defendant's exercise of his constitutional right to have a trial and to remain silent. Alternatively, defense counsel was ineffective for failing to object to that error. We disagree.

Defendant asserts that in the prosecutor's opening argument, she blamed defendant for not disclosing what happened to the victim. "A prosecutor may not comment on a defendant's silence in the face of accusation . . ." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). During opening arguments, the prosecutor stated as follows:

From there, you are also going to hear testimony from experts. You are going to hear the forensic scientists who actually come out to the scene, who collect the evidence. As we said, that decomposed body on the side of the road is taken in. Photographs are taken, evidence is taken. All of this will be presented to you.

There is also some testing that was done. The defendant's vehicle was secured. Michigan State Police crime lab go [sic] through it. They do some testing, be honest, the testing doesn't come up to much, but still the testing was done. Why? *Because the defendant didn't tell us what happened to his child.*

It had to be pieced together. And piecing it together is, once that body was taken from the scene, taken to the medical examiner's office, Doc Hunter will explain the autopsy that he went through.

And it wasn't a normal autopsy. There wasn't a full body there. So he had to call in assistance from others. That's where the anthropologist comes in. The entomologist comes in as well as the medical toxicologist, because of the condition of that body. [Emphasis added.]

When read in isolation, this statement could be taken as simply trying to blame defendant for not disclosing what happened to the victim—but when read in due context, it becomes more apparent how the statement instead sought to explain why the jury was going to be presented with so many experts, and hear about fruitful and unfruitful<sup>7</sup> evidence, before having to piece together what happened to the victim. In any event, the prosecutor's statement was extremely brief, and the trial court instructed the jury on defendant's presumption of innocence, the prosecutor's burden of proof, the defendant's right to not testify, and that the attorney's arguments did not constitute evidence. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate

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<sup>7</sup> A forensic scientist testified that although various pieces of evidence—such as stains on a booster seat, swabs from a shirt, swabs from the victim, and tissue from the victim—were forensically analyzed, each piece of evidence either did not have a DNA profile or had a DNA profile that was insufficient for comparison purposes. The scientist explained that if DNA were present, it may have been broken down by decomposition or exposure to heat and humidity.

prosecutorial statements, and jurors are presumed to follow their instructions.” *Unger*, 278 Mich App at 235 (citations omitted).

Accordingly, defendant has failed to show that, to the extent any error occurred, it affected his substantial rights or denied him a fair trial. See *Carines*, 460 Mich at 763; *Unger*, 278 Mich App at 237. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *Hughes*, \_\_\_ Mich App at \_\_\_; slip op at 3.

#### D. ELICITING PREJUDICIAL TESTIMONY

Defendant further argues that the prosecutor improperly elicited evidence of uncharged crimes that were not part of the MRE 404(b) and MCL 768.27b notice.<sup>8</sup> Alternatively, defendant claims defense counsel was ineffective for failing to object to that error. We disagree.

Specifically, defendant argues that the prosecutor improperly elicited evidence from a police officer and CPS workers. For example: (1) a police officer stated that after he told the victim’s mother that her child had died, she stated “that she knew this was going to happen”; (2) two CPS workers testified that they recommended against the victim being placed in defendant’s care because of defendant’s CPS and criminal history; and (3) when asked if there was anything that the prosecutor missed, one of those CPS workers responded by saying that even though defendant was in jail, and “even though he’s a perpetrator of our crime, we still had to go see him, because everybody has due process so we’re still seeing him.”

As an initial matter, the victim’s mother’s statement was simply an opinion that did not reference any specific prior bad acts; the CPS workers’ reference to defendant’s CPS and criminal history was brief and general; and the CPS worker’s testimony about defendant being in jail related to the fact that defendant was in jail for the charged offenses, not past offenses. Even assuming, arguendo, error in the admission of any of these statements, these vague, isolated, and seemingly inadvertent references do not warrant relief on appeal. See *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973) (“[A]n isolated or inadvertent reference to a defendant’s prior criminal activities will not result in reversible prejudice.”). Accordingly, defendant has failed to show how any alleged error affected his substantial rights or denied him a fair trial. See *Carines*, 460 Mich at 763.

Moreover, there was ample evidence presented in this case, including defendant’s interview statements, to establish his guilt beyond a reasonable doubt. Given the untainted evidence of his guilt presented at trial, defendant has failed to show how there is a reasonable probability that, even if defense counsel had objected to the statements at issue and they were stricken from the record, the result of the trial would have been different. Therefore, defendant

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<sup>8</sup> Interestingly, defendant acknowledges that “the prosecutor was allowed to present evidence from CPS worker Jennifer Raleigh” regarding the 2014 incident with KM. This acknowledgement appears to be made because Raleigh’s other-act testimony was noticed.

has also failed to show that defense counsel was ineffective. See *Hughes*, \_\_\_ Mich App at \_\_\_; slip op at 3.

Affirmed.

/s/ Philip P. Mariani

/s/ Kathleen A. Feeney

/s/ Christopher M. Trebilcock