

STATE OF MICHIGAN  
IN THE SUPREME COURT

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THE PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellee,

v

RANDALL OVERTON,  
Defendant-Appellant.

---

Supreme Court  
No. 148347

Third Circuit Court No. 11-002103  
Court of Appeals No. 308999

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148347-  
**PLAINTIFF-APPELLEE'S ANSWER OPPOSING  
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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**PLAINTIFF-APPELLEE'S ANSWER OPPOSING  
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The People of the State of Michigan, through Kym L. Worthy, Prosecuting Attorney, County of Wayne, Timothy A. Baughman, Chief of Research, Training, and Appeals, and Madonna Georges Blanchard, Assistant Prosecuting Attorney, ask this Court to deny defendant's application for leave to appeal.

1. Defendant's application relies on the same arguments he made in the Court of Appeals.
2. The People's brief on appeal in the Court of Appeals adequately addresses these issues, and is incorporated in this answer. See Attachment A.
3. The Court of Appeals did not clearly err in rejecting defendant's arguments. MCR 7.302(B)(5).
4. Defendant's application does not demonstrate any of the other grounds for granting leave to appeal. MCR 7.302(B)(1)-(3).

5. To the extent defendant raises issues in his application that he did not raise in the Court of Appeals, review is foreclosed since there is no “decision by the Court of Appeals” to review. MCR 7.301(A)(2); MCR 7.302(B)(5). See also this Court’s order denying leave in *People v Holloway*, 35 Mich App 420; lv den 387 Mich 772 (1972): “[A]n appellant may not raise in this Court an issue not presented to the Court of Appeals.”
6. In sum, defendant’s application raises no issues worthy of this Court’s review.

**Relief**

WHEREFORE, Defendant’s application for leave to appeal should be denied.

Respectfully submitted,

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Dated: January 17, 2014

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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THE PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellee,

v

RANDALL OVERTON,  
Defendant-Appellant.

Supreme Court  
No. 148347

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**ATTACHMENT A**

**STATE OF MICHIGAN  
IN THE COURT OF APPEALS**

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THE PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

vs

Court of Appeals  
No. 308999

RANDALL OVERTON,  
Defendant-Appellant.

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Third Circuit Court No. 11-002103

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**BRIEF ON APPEAL  
ORAL ARGUMENT NOT REQUESTED**

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## **Counterstatement of Jurisdiction**

The People accept and adopt defendant's statement of jurisdiction.

## **Counterstatement of Questions Presented**

### **I.**

**A defendant engages in sexual penetration with another person when he or she is involved in or takes part in a sexual penetration. Defendant directed the minor victim to insert her finger in her vagina and the victim complied. Was there sufficient evidence to support defendant's conviction of first-degree CSC?**

The trial court answered: "Yes."

The People answer: "Yes."

Defendant answers: "No."

### **II.**

**There is sufficient evidence to support a conviction of second-degree CSC if there is an intentional touching done for a sexual purpose. Defendant laid a towel on his bed and instructed the minor victim to lie his on bed and spread her legs while wearing no clothing from the waist down so that he could shave and rub ointment on her private area. Was there sufficient evidence to support the finding that defendant's actions were for a sexual purpose?**

The trial court answered: "Yes."

The People answer: "Yes."

Defendant answers: "No."

### **III.**

**A general unanimity instruction is sufficient, except when the alternative acts are materially distinct or there is reason to believe the jurors might be confused or disagree about the factual basis of the defendant's guilt. Defendant touched the minor victim's genital area in two different ways, both of which defendant denied. Was it plain error to give the general unanimity instruction?**

The trial court answered: "No."

The People answer: "No."

Defendant answers: "Yes."

#### IV.

**An act is an act of gross indecency if it is sexual in nature under the totality of the circumstances. Defendant instructed the minor victim to lie on a towel on his bed after she got out of the shower, wearing no clothing, spread her legs, and spread her vagina with her fingers, so that he could place his head 18 to 24 inches away from her genital area on three or more occasions. Was there sufficient evidence to find defendant guilty of gross indecency?**

The trial court answered: "Yes."

The People answer: "Yes."

Defendant answers: "No."

#### V.

**Jury instructions must clearly present the case and the applicable law to the jury and a statute must provide fair notice of the conduct proscribed. Defendant placed his head 18 to 24 inches away from the victim's genital area while instructing her to spread her genital area; the trial court instructed the jury that the People must prove that defendant engaged in a sexual act with the intent to derive sexual gratification. Did the trial court abuse its discretion when it instructed the jury on gross indecency or when it found that defendant was given fair notice that his conduct was prohibited under the statute?**

The trial court answered: "No."

The People answer: "No."

Defendant answers: "Yes."

#### VI.

**Defendant is required to overcome the presumption of adequate assistance of counsel. Here, the record does not support each claim of error. Did defendant receive effective assistance of counsel?**

The trial court answered: "Yes."

The People answer: "Yes."

Defendant answers: "No."

**VII.**

**The rule of completeness applies when a writing or recorded statement or part thereof is introduced by a party. No part of the taped interview was admitted into evidence or presented to the jury. Did the trial court abuse its discretion by excluding the taped interview and denying defendant's motion for a new trial?**

The trial court answered: "No."

The People answer: "No."

Defendant answers: "Yes."

**VIII.**

**A sentence mandated by the Legislature is presumed to be both proportional and valid. Defendant was convicted of first-degree CSC for instructing a 12 year-old girl to insert her finger in her vagina. Was defendant's sentence to the 25-year mandatory minimum cruel or unusual?**

The trial court answered: "No."

The People answer: "No."

Defendant answers: "Yes."

### Counterstatement of Facts

After a jury trial, defendant Randall Scott Overton was found guilty<sup>1</sup> of first-degree criminal sexual conduct (CSC),<sup>2</sup> second-degree CSC,<sup>3</sup> and three counts of gross indecency.<sup>4</sup> The jury found defendant not guilty of count four, child sexually abusive activity<sup>5</sup> and count five, accosting a minor for immoral purposes.<sup>6</sup> The trial court sentenced defendant to the mandatory minimum of 25 years for first-degree CSC, 29 months to 15 years for second-degree CSC, and 17 months to 5 years on the three counts of gross indecency, to be served concurrently to defendant's sentence of first-degree CSC.<sup>7</sup> On August 1, 2011, defendant filed a motion for a new trial in the trial court raising the same claims he now raises on appeal. On January 30, 2012, the trial court denied defendant's motion for a new trial.

When the victim was 12 years old defendant would require her to show him her vaginal area, place her finger in her vagina, allow him to shave and rub ointment on her private area. Defendant performed "virginity checks" on the minor victim, but only when she exited the shower and when he was the sole adult present.<sup>8</sup> During these "virginity checks" defendant required the victim to lie

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<sup>1</sup> Transcripts are cited throughout this Brief in the following form: month/day of proceedings, page numbers. 6/7, 5-6.

<sup>2</sup> MCL 750.520b.

<sup>3</sup> MCL 750.520c.

<sup>4</sup> MCL 750.338b.

<sup>5</sup> MCL 750.145c.

<sup>6</sup> MCL 750.145a.

<sup>7</sup> 6/21, 23.

<sup>8</sup> 6/2, 49-51.

on defendant's bed, with nothing on but a towel, spread her legs, and spread her vagina with her fingers, while defendant looked at the victim's vagina from 18 to 24 inches away.<sup>9</sup>

In another incident, defendant directed the minor victim to lie on his bed, with no clothing from the waist down, and insert her finger in her vagina, ostensibly to show her where a tampon goes, while defendant held a mirror in front of her.<sup>10</sup>

In yet another incident, defendant touched the victim's pubic area. When the victim was shaving her private area with an electric shaver, defendant informed her that she had missed several spots and instructed her to lie on a towel that defendant had laid out on his bed and open her legs, with no clothing on the bottom part of her body.<sup>11</sup> Defendant proceeded to shave the "bottom part," described as the "pubic area," with the electric shaver.<sup>12</sup> The victim did not want that area shaved.<sup>13</sup> The victim then developed bumps on her private area and defendant told the victim that she "had to put ointment on it."<sup>14</sup> The victim put ointment on the area and although she did not need help, defendant also rubbed ointment on the minor victim's private area.<sup>15</sup>

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<sup>9</sup> 6/2, 53.

<sup>10</sup> 6/2, 65-66.

<sup>11</sup> 6/2, 56-57.

<sup>12</sup> 6/2, 58.

<sup>13</sup> *Id.*

<sup>14</sup> 6/2, 58-59.

<sup>15</sup> 6/2, 59.

Amanda Doss, a case worker from Child Protective Services testified that she met with the victim at school and, after their discussion, arranged a Kid's Talk interview.<sup>16</sup> Doss told codefendant Chrystal [REDACTED] (the victim's mother) that [REDACTED] was not to drive the victim to the interview.<sup>17</sup> Despite Doss's instruction, codefendant drove the victim to the Kid's Talk interview. Doss and her supervisors expressed to codefendant that she was not supposed to drive the victim to the interview; codefendant then arranged for defendant's father to pick up the victim.<sup>18</sup> Doss testified that "[a]fter the disclosure [the victim] made at Kid's Talk, in speaking with her, she was very afraid to go home. She was very afraid that there would be repercussions for her telling the truth. She felt unsafe."<sup>19</sup> Doss placed the victim in a shelter and her brother in foster care.<sup>20</sup> The victim was later permanently placed with her biological father.<sup>21</sup> After the Kid's Talk interview Doss had a telephone conversation with defendant, in which he admitted to the following: he had the victim put her finger in her vagina at his direction; he shaved her pubic hair; he checked her vaginal area multiple times; and he checked her underwear to see if they fit.<sup>22</sup>

Further facts will be developed as they relate to the issues on appeal.

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<sup>16</sup> 6/1, Vol. II, 15-17.

<sup>17</sup> 6/1, Vol. II, 19.

<sup>18</sup> 6/1, Vol. II, 19-20.

<sup>19</sup> *Id.*

<sup>20</sup> 6/1, Vol. II, 21-22.

<sup>21</sup> 6/2, 37.

<sup>22</sup> 6/1, Vol. II, 26-27.

## Argument

### I.

**A defendant engages in sexual penetration with another person when he or she is involved in or takes part in a sexual penetration. Defendant directed the minor victim to insert her finger in her vagina and the victim complied. Sufficient evidence exists to support defendant's conviction of first-degree CSC.**

#### Standard of Review

A challenge to the sufficiency of the evidence is reviewed de novo,<sup>23</sup> in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>24</sup> Any conflict in the evidence must be resolved in the prosecution's favor,<sup>25</sup> "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict."<sup>26</sup> Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime.<sup>27</sup> This Court reviews statutory questions de novo.<sup>28</sup>

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<sup>23</sup> *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009).

<sup>24</sup> *People v Wolfe*, 440 Mich 508, 515–516; 489 NW2d 748 (1992).

<sup>25</sup> *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004), citing *Wolfe*, *supra* at 514-515.

<sup>26</sup> *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

<sup>27</sup> *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), citing *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

<sup>28</sup> *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011), citing *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

## Discussion

Sufficient evidence exists to find defendant guilty of first-degree criminal sexual conduct (CSC). Defendant alleges insufficiency of the evidence on one element of his first-degree CSC conviction, proof of “sexual penetration with another person.”<sup>29</sup>

According to the plain language of the statute, defendant engaged in a sexual penetration with another person. When interpreting a statute, this Court’s goal is to give effect to the intent of the Legislature by reviewing the plain language of the statute.<sup>30</sup> “If the language is clear, no further construction is necessary or allowed to expand what the legislature clearly intended to cover.”<sup>31</sup> This Court may consult dictionary definition of terms that are not defined in a statute.<sup>32</sup>

A person is guilty of CSC in the first degree if (1) he or she engages in sexual penetration (2) with another person and (3) that other person is under 13 years of age.<sup>33</sup> First-degree CSC is a general intent crime, thus, no intent is required other than that evidenced by the doing of the act(s) constituting the offense.<sup>34</sup> The CSC statute defines sexual penetration as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body, or of any object into the genital or anal openings of another person’s body, but emission of

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<sup>29</sup> Defendant’s Brief on Appeal, 9.

<sup>30</sup> *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005), citing *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

<sup>31</sup> *Koonce, supra* at 518, citing *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999).

<sup>32</sup> *People v Zajackowski*, 493 Mich 6, 13; 825 NW2d 554 (2012).

<sup>33</sup> MCL 750.520b(1)(a).

<sup>34</sup> *People v Sabin*, 463 Mich 43, 69; 614 NW 2d 888 (2000) (citation omitted).

semen is not required.”<sup>35</sup> The Criminal Sexual Conduct statute does not define the word “engage.” “Engage” is defined as: “to employ or involve oneself; to take part in; to embark on,”<sup>36</sup> or “to do or take part in something.”<sup>37</sup> Accordingly, one only needs to involve one’s self or *take part* in the sexual penetration of another person to satisfy the first element.

According to the plain language of the statute, the People presented sufficient evidence to find defendant guilty of engaging in sexual penetration with the victim. Defendant involved himself and took part in the sexual penetration of the minor victim, another person, when he directed her to penetrate her vagina with her finger.<sup>38</sup> Defendant acted as a principal under his own direction in committing first-degree CSC. Therefore, defendant’s claim must fail.

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<sup>35</sup> MCL 750.520a(r).

<sup>36</sup> Black’s Law Dictionary (9th ed).

<sup>37</sup> Merriam-Webster’s Collegiate Dictionary, Eleventh Edition.

<sup>38</sup> 6/2, 65-66.

## II.

**There is sufficient evidence to support a conviction of second-degree CSC if there is an intentional touching done for a sexual purpose. Defendant laid a towel on his bed and instructed the minor victim to lie on his bed and spread her legs while wearing no clothing from the waist down so that he could shave and rub ointment on her private area. The People presented sufficient evidence to support the finding that defendant's actions were for a sexual purpose.**

### Standard of Review

A challenge to the sufficiency of the evidence is reviewed de novo,<sup>39</sup> in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>40</sup> Any conflict in the evidence must be resolved in the prosecution's favor,<sup>41</sup> "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict."<sup>42</sup> This Court reviews statutory questions de novo.<sup>43</sup>

### Discussion

Sufficient evidence exists to find defendant guilty of second-degree criminal sexual conduct (CSC). Contrary to defendant's assertions,<sup>44</sup> his actions, viewed objectively, could reasonably be construed to be for a sexual purpose. Under MCL 750.520c, "[a] person is guilty of criminal sexual

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<sup>39</sup> *Harrison, supra* at 377.

<sup>40</sup> *Wolfe, supra* at 515–516.

<sup>41</sup> *Fletcher, supra* at 561, citing *Wolfe, supra* at 514-515.

<sup>42</sup> *Nowack, supra* at 400.

<sup>43</sup> *Orlewicz, supra* at 101, citing *McPherson, supra* at 131.

<sup>44</sup> Defendant's Brief on Appeal, 15. Defendant argues that the People failed to prove that defendant had a sexual purpose.

conduct in the second degree if the person engages in sexual contact with another person”<sup>45</sup> and “that other person is under 13 years of age.”<sup>46</sup> Sexual contact is defined as the following, in relevant part:

[T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose.<sup>47</sup>

Second-degree CSC is a general intent crime.<sup>48</sup> Whether a defendant’s actions were for a sexual purpose within the definition of sexual contact, is viewed objectively and determined by the jury.<sup>49</sup>

“Minimal circumstantial evidence is sufficient to prove an actor’s state of mind.”<sup>50</sup>

The People presented sufficient evidence for a reasonable trier of fact to find that defendant’s actions, viewed objectively, were for a sexual purpose. Defendant informed the victim that she had missed several spots when shaving her pubic hair and instructed her to lie on a towel that defendant laid out on his bed, and open her legs, while wearing no clothing on the bottom part of her body.<sup>51</sup> Defendant then proceeded to shave the “bottom part,” described as the “pubic area.”<sup>52</sup> The victim

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<sup>45</sup> MCL 750.520c(1).

<sup>46</sup> MCL 750.520c(1)(a).

<sup>47</sup> MCL 750.520a(q).

<sup>48</sup> *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997).

<sup>49</sup> *Piper*, *supra* at 647.

<sup>50</sup> *People v Fennell*, 260 Mich App 261, 270–271; 677 NW2d 66 (2004) (citation omitted).

<sup>51</sup> 6/2, 56-57.

<sup>52</sup> 6/2, 58.

did not want that area shaved.<sup>53</sup> The victim then developed bumps on her private area; defendant told the victim that she “had to put ointment on it.”<sup>54</sup> The victim put ointment on the area and although she did not need help, defendant rubbed ointment on the victim’s private area.<sup>55</sup> The jury reasonable construed defendant’s actions, laying the towel on his bed, instructing the victim to lie on the bed while wearing no clothing from the waist down and to spread her legs, all so that he could shave an area she did not want shaved, as done for a sexual purpose.

### III.

**A general unanimity instruction is sufficient, except when the alternative acts are materially distinct or there is reason to believe the jurors might be confused or disagree about the factual basis of the defendant’s guilt. Defendant touched the minor victim’s genital area in two different ways, both of which defendant denied. It was not plain error to give the general unanimity instruction.**

#### Standard of Review

The trial court may grant a motion for a new trial “on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.”<sup>56</sup> This Court reviews for an abuse of discretion a trial court’s decision to

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<sup>53</sup> 6/2, 58.

<sup>54</sup> 6/2, 58-59.

<sup>55</sup> 6/2, 59.

<sup>56</sup> MCR 6.431(B).

grant or deny a motion for a new trial.<sup>57</sup> An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions.<sup>58</sup>

The applicability of jury instructions is a question of law, reviewed de novo.<sup>59</sup> “This Court reviews jury instructions as a whole to determine whether there is error requiring reversal.”<sup>60</sup> Defendant did not object to the second-degree CSC and the general unanimity instructions in the trial court and agreed to the instructions as given; therefore, the issue was not preserved for appeal.<sup>61</sup> This Court reviews unpreserved claims of nonconstitutional error only if the defendant establishes plain error affecting substantial rights.<sup>62</sup>

### **Discussion**

A four-part test is used to determine whether an unpreserved claim of error warrants reversal: (1) error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights, which is a showing of prejudice that the error affected the outcome of the lower proceeding.<sup>63</sup> Lastly, if the first three requirements are met, reversal is only warranted if the error “resulted in the conviction of an actually innocent defendant,” or “seriously affected the fairness, integrity or public

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<sup>57</sup> *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012), citing *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

<sup>58</sup> *Rao, supra* at 279, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

<sup>59</sup> *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

<sup>60</sup> *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998) (citation omitted).

<sup>61</sup> *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

<sup>62</sup> *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

<sup>63</sup> *Carines, supra* at 763.

reputation of judicial proceedings.”<sup>64</sup> If a curative instruction could have alleviated any prejudicial effect, reversal is not warranted.<sup>65</sup>

The jury was properly instructed. Defendant cites *People v Yarger*<sup>66</sup> in support of his erroneous position that the jurors were not properly instructed in his case.<sup>67</sup> However, as in *People v Cooks*,<sup>68</sup> *People v Yarger* is distinguishable from the instant case.

In order to protect a defendant’s right to a unanimous verdict it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement.<sup>69</sup> The Michigan Supreme Court in *People v Cooks* held that in general, “if alternative acts allegedly committed by [a] defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate.”<sup>70</sup> The exception to this general rule, if the issue is preserved by defense counsel, is if (1) “the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternative),”<sup>71</sup> or (2) “there is reason to believe the

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<sup>64</sup> *People v Shafier*, 483 Mich 205, 220; 738 NW2d 305 (2009), citing *Carines*, *supra* at 763.

<sup>65</sup> *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

<sup>66</sup> *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992).

<sup>67</sup> Defendant’s Brief on Appeal, 19-20.

<sup>68</sup> *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994).

<sup>69</sup> *Cooks*, *supra* at 511.

<sup>70</sup> *Cooks*, *supra* at 524.

<sup>71</sup> *Cooks*, *supra* at 525.

jurors might be confused or disagree about the factual basis of [the] defendant's guilt."<sup>72</sup> In *Cooks*, the Court held that even if it were to conclude that the trial court erred in failing to give the requested specific unanimity instruction, the defendant would not be entitled to relief because he failed to show a manifest injustice, and neither objected to the instructions given regarding second-degree CSC,<sup>73</sup> nor requested a specific unanimity instruction with respect to a particular act of sexual contact.<sup>74</sup>

Here, the general unanimous jury instruction was sufficient. The trial court gave the following instruction: "[a] verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict."<sup>75</sup> The trial court satisfied the *Cooks* general rule by providing the general instruction that the decision must be unanimous.

Defendant fails to show that either exception to the rule in *Cooks* is present. First, the alternative acts are not materially distinct. Neither party offered materially distinct proofs regarding the acts. The minor victim testified that defendant touched her vaginal area via an electric shaver and then rubbed her private area with ointment. Defendant testified, but only admitted to shaving her "bikini line area of her body."<sup>76</sup> Specifically, defendant stated that he shaved her inner thigh area and that the victim's mother was present at the time.<sup>77</sup> Defendant denied that there was ever an

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<sup>72</sup> *Cooks, supra* at 525.

<sup>73</sup> The defendant only objected to the instruction as it related to first-degree criminal sexual conduct. *Cooks, supra* at 508.

<sup>74</sup> *Cooks, supra* at 529 n 33.

<sup>75</sup> 6/6, 143.

<sup>76</sup> 6/2, 181.

<sup>77</sup> 6/2, 181.

incident with ointment.<sup>78</sup> As in *Cooks*, defendant denied the incidents, as described by the victim, ever took place.<sup>79</sup>

Second, there is no reason to believe that the jurors might be confused or disagree about the factual basis of defendant's guilt. No questions were asked during deliberations regarding the charged offense of second-degree CSC.<sup>80</sup> Just as in *Cooks*, defendant here failed to object to the unanimity instruction and fails to show a manifest injustice. The general unanimous jury instruction was sufficient and there was not a manifest injustice. The evidence of guilt was overwhelming. Defendant fails to show that any plain error affected his substantial rights such that the jury convicted an actually innocent person.

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<sup>78</sup> 6/2, 216-217.

<sup>79</sup> 6/2, 182.

<sup>80</sup> Defendant argues that "at least one juror considered the ointment issue as a possible basis for the charge. When asked if the jurors had any questions during Mr. Overton's testimony, one juror passed a note that read, '[c]an you describe the incident with the ointment.'" Defendant's Brief on Appeal, 18. During the jury instructions, the trial court gave the general unanimity instruction, and no further questions were asked on the topic by the jurors. Defendant fails to show how the juror's question, which elicited testimony during trial, indicates that the jurors were confused or disagreed about the factual basis of defendant's guilt during deliberations.

#### IV.

**An act is an act of gross indecency if it is sexual in nature under the totality of the circumstances. Defendant instructed the minor victim to lie on a towel on his bed after she got out of the shower, wearing no clothing, spread her legs, and spread her vagina with her fingers, so that he could place his head 18 to 24 inches away from her genital area on three or more occasions. Sufficient evidence exists to find defendant guilty of gross indecency.**

#### **Standard of review**

A challenge to the sufficiency of the evidence is reviewed de novo,<sup>81</sup> in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>82</sup> Any conflict in the evidence must be resolved in the prosecution's favor,<sup>83</sup> "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict."<sup>84</sup> This Court reviews statutory questions de novo.<sup>85</sup>

#### **Discussion**

Contrary to defendant's assertions, there was sufficient evidence to support his convictions of gross indecency. The gross indecency statute states the following, in relevant part:

Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section...Any person who procures or attempts to procure the

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<sup>81</sup> *Harrison, supra* at 377.

<sup>82</sup> *Wolfe, supra* at 515-516.

<sup>83</sup> *Fletcher, supra* at 561, citing *Wolfe, supra* at 514-515.

<sup>84</sup> *Nowack, supra* at 400.

<sup>85</sup> *Orlewicz, supra* at 101, citing *McPherson, supra* at 131.

commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section.<sup>86</sup>

“Minimal circumstantial evidence is sufficient to prove an actor’s state of mind.”<sup>87</sup> Courts decide whether an act is an act of gross indecency on a case-by-case basis.<sup>88</sup> In *People v Drake*, this Court held that while grossly indecent behavior includes overt sexual touching, an overt act is not required.<sup>89</sup> In *Drake*, the witnesses testified that the defendant would invite them over and award them points for various activities, including beating him, spiting on him and his food, and providing him with urine, feces, and used tampons.<sup>90</sup> The witnesses testified that they never saw the defendant sexually gratify himself, nor did he engage in any overt sexual touching or contact with the witnesses.<sup>91</sup> *Drake* reasoned that an individual can derive sexual gratification from a variety of acts without engaging in sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person’s genitals or anus.<sup>92</sup> Further, the “operative principle is that the activity be sexual in

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<sup>86</sup> MCL 750.338b.

<sup>87</sup> *Fennell, supra* at 270–271 (citation omitted).

<sup>88</sup> *People v Drake*, 246 Mich App 637, 641–642; 633 NW2d 469 (2001), citing *People v Lino*, 447 Mich 567, 602; 527 NW2d 434 (1994). See *People v Bono*, 249 Mich App 115, 121; 641 NW2d 278 (2002), quoting *People v Warren*, 449 Mich 341, 345; 535 NW2d (1995) (“one of the lessons of the *Lino* inquiry is that it is prudent to decide only the case before us, and not attempt to catalog what is permitted and prohibited.”).

<sup>89</sup> *Drake, supra* at 642.

<sup>90</sup> *Drake, supra* at 638.

<sup>91</sup> *Drake, supra* at 639.

<sup>92</sup> *Drake, supra* at 642.

nature.”<sup>93</sup> Under this rationale, *Drake* explained “[i]n order to constitute grossly indecent behavior, the acts must be overt in the sense that they are open and perceivable. The motivation for the behavior can be inferred from the totality of the circumstances and should be considered case by case.”<sup>94</sup> *Drake* found that the evidence was sufficient to believe the crime of gross indecency was committed.<sup>95</sup> While *Drake* dealt with an appeal from the failure to bind a case over, its holding addressed what must be proven under the gross indecency statute and, therefore, is not dicta.<sup>96</sup>

Defendant erroneously cites *People v Bono*<sup>97</sup> for the proposition that the Court of Appeals backed away from an expansive view of the gross indecency statute.<sup>98</sup> The facts in *Bono* are distinguishable from the facts in *Drake*. *Bono* determined whether masturbation in public, between consenting adult males, is grossly indecent.<sup>99</sup> In resolving the issue, *Bono* also addressed whether the jury instruction for gross indecency is consistent with the case law regarding whether masturbation can be grossly indecent. *Bono* looked at the previous jury instruction, which provided that “‘gross indecency’ must include some sort of penetration, fellatio, or cunnilingus,” and

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<sup>93</sup> *Drake, supra* at 642. Defendant’s footnote 3, is in complete contradiction to the holding in *Drake* that the activity must be sexual in nature. Defendant’s Brief on Appeal, 23 n 3.

<sup>94</sup> *Drake, supra* at 642, citing *People v Jones*, 222 Mich App 595, 602; 563 NW2d 719 (1997).

<sup>95</sup> *Drake, supra* at 643.

<sup>96</sup> *People v Williams*, 475 Mich 245, 251 n 1; 716 NW2d 208 (2006) (dictum is a “judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.”).

<sup>97</sup> *People v Bono*, 249 Mich App 115; 641 NW2d 278 (2002).

<sup>98</sup> Defendant’s Brief on Appeal, 22.

<sup>99</sup> *Bono, supra* at 121.

determined that “there are no Michigan cases holding that there must be some penetration, fellatio, or cunnilingus to constitute gross indecency.”<sup>100</sup> Similar to *Drake*, which held that the act must be sexual in nature, *Bono* held that masturbation is an “ultimate sex act” and ultimate sex acts committed in public are included within the definition of gross indecency.<sup>101</sup>

As this Court did in *Bono*, to resolve whether defendant’s acts are acts of gross indecency, we must look at Michigan case law to determine whether an overt touching is required. There are no Michigan cases that require an overt touching for the act to constitute gross indecency. To the contrary, this Court in *Drake* held that an overt touching is *not* required. Here, the act is one that violates the gross indecency statute because defendant committed an ultimate sex act with a minor.

This Court must determine whether a jury could reasonably find that defendant’s actions on three or more occasions, requiring the minor victim to lie on his bed naked but for a towel, spread her legs, spread her vagina with her fingers, and allow him to place his head 18 to 24 inches away to view her genital area, were acts of gross indecency. The main inquiry is whether the act is sexual in nature. This Court must look at the surrounding circumstances to determine whether defendant’s actions constitute gross indecency.<sup>102</sup> The act alleged cannot be looked at in a vacuum or separated from the factual situation in which it took place.<sup>103</sup>

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<sup>100</sup> *Bono, supra* at 123.

<sup>101</sup> *Bono, supra* at 122. Distinguishable from the case at bar, both *Lino* and *Bono*, dealt with public sex acts, while the acts in *Drake* were done in private.

<sup>102</sup> *Bono, supra* at 121 (citation omitted).

<sup>103</sup> *Jones, supra* 222 Mich App at 604.

Defendant committed acts of gross indecency. First, defendant's acts were admittedly sexual in nature. Defendant states that "a mere act of voyeurism does not constitute an act of gross indecency."<sup>104</sup> Voyeurism is defined as the "practice of obtaining sexual gratification by looking at sexual objects or acts, especially secretly."<sup>105</sup> Black's Law Dictionary defines voyeurism as, "gratification derived from observing the genitals or sexual acts of others."<sup>106</sup> Voyeurism may constitute an act of gross indecency when viewing the surrounding circumstances. Defendant's acts were also objectively sexual in nature. Defendant required the victim to position herself on his bed, naked but for a towel and touch herself, so that he could place his head between her legs approximately 18 to 24 inches away from her vagina.<sup>107</sup>

Second, it can be reasonably inferred that defendant received gratification from observing the victim's genitals because he would wait for the victim to exit from the shower to perform these "virginity checks," with no information that the victim may have lost her virginity.<sup>108</sup> Third, the victim was a child under the age of consent, only 12-years-old when defendant arranged her so that he could stare at her genitals and watch as he made her touch herself.<sup>109</sup> Fourth, defendant would perform these virginity checks when he was the only adult present.<sup>110</sup> When viewing the surrounding

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<sup>104</sup> Defendant's Brief on Appeal, 24.

<sup>105</sup> Merriam-Webster's Collegiate Dictionary, Eleventh Edition.

<sup>106</sup> Black's Law Dictionary (9th ed).

<sup>107</sup> 6/2, 53.

<sup>108</sup> 6/2, 50-51.

<sup>109</sup> 6/2, 49.

<sup>110</sup> *Id.*

circumstances, there was sufficient evidence for any reasonable trier of fact to find defendant guilty of acts of gross indecency. The trial court did not abuse its discretion when it denied defendant's request for a new trial.

## V.

**Jury instructions must clearly present the case and the applicable law to the jury and a statute must provide fair notice of the conduct proscribed. Defendant placed his head 18 to 24 inches away from the victim's genital area while instructing her to spread her genital area; the trial court instructed the jury that the People must prove that defendant engaged in a sexual act with the intent to derive sexual gratification. The trial court did not abuse its discretion when it instructed the jury on gross indecency or when it found that defendant was given fair notice that his conduct was prohibited under the statute.**

### Standard of Review

The trial court may grant a motion for a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice."<sup>111</sup> This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial.<sup>112</sup> An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions.<sup>113</sup>

Because defendant objected to the gross indecency jury instruction by arguing that the instruction must include the requirement of a manual or oral sexual act, he has preserved this claim.<sup>114</sup> This Court reviews defendant's preserved instructional claim of error for a miscarriage of

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<sup>111</sup> MCR 6.431(B).

<sup>112</sup> *Rao, supra* at 279, citing *Lemmon, supra* at 648 n 27.

<sup>113</sup> *Rao, supra* at 279, citing *Babcock, supra* at 269.

<sup>114</sup> 6/1, 136.

justice. “[T]he defendant has the burden of establishing a miscarriage of justice under a ‘more probable than not’ standard in order to justify reversing a conviction.”<sup>115</sup> An error is outcome-determinative if it undermines the reliability of the verdict.<sup>116</sup>

Defendant also argues that he did not have adequate notice that the charged conduct was unlawful. This Court reviews constitutional and statutory questions de novo.<sup>117</sup>

## Discussion

### A. The trial court properly instructed the jury on the charge of gross indecency.

“Jury instructions must clearly present the case and the applicable law to the jury.”<sup>118</sup> There is no manifest injustice because the jury was instructed in accordance with the law.<sup>119</sup>

The trial court gave the following jury instruction for the charges of gross indecency:

The defendant is charged with committing the crime of Gross Indecency. To prove this charge, the prosecutor must prove each of the elements beyond a reasonable doubt. First, the Defendant caused [the victim] to engage in a sexual act that involved spreading apart in

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<sup>115</sup> *People v Houthoofd*, 487 Mich 568, 587; 790 NW2d 315 (2010), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

<sup>116</sup> *Houthoofd*, *supra* at 587, quoting *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

<sup>117</sup> *Orlewicz*, *supra* at 101, citing *McPherson*, *supra* at 131. See *People v Russell*, 266 Mich App 307, 309; 703 NW2d 107 (2005).

<sup>118</sup> *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (citation omitted).

<sup>119</sup> Defendant also erroneously argues that “unless the approach taken in *Drake* is followed, the evidence is insufficient to sustain Mr. Overton’s convictions.” Defendant’s Brief on Appeal, 26. This statement is wrong because the Court repeatedly held that each case must be looked at on a case-by-case basis, and because no court has held that an overt touching is required. Regardless of whether this Court follows *Drake*, this Court may find, based on the totality of the circumstances, that the act was an act of gross indecency without any overt touching by defendant.

her genital area, with her hand, so, Defendant, Overton, could look at her genital area. Second, that when Defendant, Overton, did this, he did it with the intent that he derived sexual gratification from the act. To prove this charge, the prosecution does not have to prove their [sic] was sexual contact between [the victim] and Defendant, Overton. The Defendant's intent may be proved by what he said, what he did, or by any other facts and circumstances in evidence.<sup>120</sup>

The trial court's jury instructions clearly presented the case and the applicable law on gross indecency. The gross indecency statute states:

Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section...Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section.<sup>121</sup>

The trial court gave an instruction in line with the reasoning previously stated<sup>122</sup> that an act is grossly indecent when the act is sexual in nature under the surrounding circumstances. Here, the acts at issue included defendant requiring the minor victim, to lie on his bed naked but for a towel and spread apart her genital area with her hands so that defendant could watch. Then, the trial court gave the second part of the instruction, which required that the acts of the victim spreading apart her genital area with her fingers at defendant's request be considered in conjunction with the finding that defendant had the intent to derive sexual gratification. Accordingly, the acts are sexual in nature in conjunction with the intent to derive sexual gratification. The trial court instructed the jury on the gross indecency statute in accordance with the law; therefore, no manifest injustice occurred.

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<sup>120</sup> 6/6, 142.

<sup>121</sup> MCL 750.338b.

<sup>122</sup> *Supra*, Argument IV.

**B. Defendant had constitutionally adequate notice under the gross indecency statute.**

Defendant argues that the gross indecency statute failed to provide notice of the conduct prohibited. A statute challenged on constitutional grounds is presumed to be constitutional and will be construed as such unless its unconstitutionality is clearly apparent.<sup>123</sup> A statute is unconstitutionally vague under the following circumstances: “(1) it is overbroad, impinging on First Amendment freedoms or (2) it does not provide fair notice of the conduct proscribed or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.”<sup>124</sup> “The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case.”<sup>125</sup> The United States Supreme Court held that “‘many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties’ . . . All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.”<sup>126</sup>

The gross indecency statute states:

Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section...Any person who procures or attempts to procure the

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<sup>123</sup> *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998) (citation omitted).

<sup>124</sup> *Vronko*, *supra* at 652.

<sup>125</sup> *People v Newton*, 257 Mich App 61, 66; 665 NW2d 504 (2003), citing *Vronko*, *supra* at 652.

<sup>126</sup> *Rose v Locke*, 423 US 48, 49-50; 96 S Ct 243; 46 L Ed 2d 185 (1975), quoting *Robinson v US*, 324 US 282, 286; 65 S Ct 666; 89 L Ed 944 (1945).

commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section.<sup>127</sup>

The Michigan Supreme Court in *People v Lino*,<sup>128</sup> when dealing with the defendant *Brashier*, held that the defendant was on notice that sexual activity involving persons under the age of consent could constitute the statutory crime of gross indecency.<sup>129</sup>

Similarly, the gross indecency statute as applied to defendant is not fatally vague. The statute gave sufficient warning for defendant to conduct himself in a way that is not forbidden. The statute states that “[a]ny male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person.”<sup>130</sup> Defendant, a male, had notice that his conduct of having the victim, only 12 years of age, lie on his bed with just a towel, spread her legs, and spread her vagina with her fingers so that he could stare at her genitals from a distance of 18 to 24 inches was gross indecency. Not only was the victim a female, she was a child. As held in *Lino*, sexual activity involving persons under the age of consent may constitute gross indecency. Moreover, defendant had no special relationship with the victim other than he was her biological mother’s ex-boyfriend. Defendant was on notice that it was forbidden to place his head between a naked 12-year-old girl’s legs while requiring her to spread her vagina with her fingers. Therefore, defendant’s claim must fail.

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<sup>127</sup> MCL 750.338b.

<sup>128</sup> *Lino, supra* at 602.

<sup>129</sup> Contrary to defendant’s claim that “in light of the holding in *Lino, supra*, Mr. Overton did not have notice that the behavior at issue here was prohibited by the gross indecency statute.” Defendant’s Brief on Appeal, 28.

<sup>130</sup> MCL 750.338b.

## VI.

**Defendant is required to overcome the presumption of adequate assistance of counsel. Here, the record does not support each claim of error. Defendant received effective assistance of counsel.**

### **Standard of Review**

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial.<sup>131</sup> An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions.<sup>132</sup> This Court reviews constitutional and statutory questions de novo.<sup>133</sup>

### **Discussion**

To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness and (2) that but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different.<sup>134</sup> "To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different."<sup>135</sup> The defendant must overcome the strong presumption that trial counsel's conduct falls within the wide range of

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<sup>131</sup> *Rao, supra* at 279, citing *Lemmon, supra* at 648 n 27.

<sup>132</sup> *Rao, supra* at 279, citing *Babcock, supra* at 269.

<sup>133</sup> *Orlewicz, supra* at 101, citing *McPherson, supra* at 131.

<sup>134</sup> *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010), citing *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

<sup>135</sup> *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

reasonable professional assistance.<sup>136</sup> Moreover, “trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.”<sup>137</sup> When a trial counsel’s actions are a matter of trial strategy, this Court will not substitute its judgment for that of counsel.<sup>138</sup>

**A. Trial counsel moved for a directed verdict.**

Defendant erroneously claims that trial counsel’s failure to file a motion for a directed verdict constituted ineffective assistance of counsel.<sup>139</sup> A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.<sup>140</sup> Defendant merely states the allegation, but ignores the record. Trial counsel did make a motion for a directed verdict. Trial counsel first requested (at the close of the People’s proofs) that the trial court “reserve a ruling, which is a motion which is customary? It does not have to be made at this point.”<sup>141</sup> Trial counsel renewed his motion and stated the following: “I don’t want to get this lost, you know, that at close of the case, I want to make it clear. I did put on the record, that I was moving for a directed verdict

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<sup>136</sup> *Strickland v Washington*, 466 US 668, 689, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). See *Swain, supra* at 643, citing *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

<sup>137</sup> *People v Cline*, 276 Mich App 634, 641-642; 741 NW2d 563 (2007), quoting *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

<sup>138</sup> *Fike, supra* at 183 (citation omitted).

<sup>139</sup> Defendant’s Brief on Appeal, 31. Defendant no longer claims that defense counsel was ineffective for failing to file a motion to quash as he did in his Motion for a New Trial. Regardless, trial counsel did make a “motion to quash or any alternative for those particulars,” which was resolved at the final conference/motion hearing. 5/20,14-15.

<sup>140</sup> *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

<sup>141</sup> 6/2, 157.

of not guilty on all counts in that the evidence does not support those charges. I am guessing the Court doesn't need me to argue that."<sup>142</sup> The trial court stated the following, in response:

Yes. I do recall that and thank you, Counsel. The record should be made that both counsel had indicated that was the request on the record. The Court had indicated that I would put that on the record at some point in time. Of course, the Court must, at that juncture review the evidence in the light most favorable to the People, in ascertaining whether any reasonable trier of fact could find that the elements of the charges have been made beyond a reasonable doubt. As such, the Court will deny the motion.<sup>143</sup>

Because trial counsel did challenge the sufficiency of the evidence via a motion for a directed verdict, defendant's claim of ineffective assistance of counsel must fail.

Next, defendant erroneously argues that trial counsel's failure to object to the trial judge's jury instructions regarding second-degree CSC and the elements of gross indecency constituted ineffective assistance of counsel. As stated *supra*, Argument V, the jury instructions for gross indecency were proper. Moreover, trial counsel did in fact object to the gross indecency jury instruction as proposed by the People and requested that the instruction include a "manual or oral act."<sup>144</sup> Both trial counsel and the People raised the issue and the trial court made a ruling. There is no factual predicate for defendant's claim.<sup>145</sup>

Trial counsel is not required to make futile objections. As stated *supra*, Argument III, the jury instructions for second-degree CSC were proper and a general unanimous jury instruction was all that was required. Here, similar to *Cooks*, the number or specific identification of the acts for

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<sup>142</sup> 6/6, 132.

<sup>143</sup> 6/6, 132-133.

<sup>144</sup> 6/1, Vol. I, 135.

<sup>145</sup> *Hoag, supra* at 6.

second-degree CSC was not in dispute. Rather, defendant's position was simply that there was no sexual assault committed as described by the victim. Accordingly, the lack of an instruction requiring unanimity on a particular act in no way impeded the defense or denied defendant a fair trial.

**B. Defendant fails to rebut the presumption that trial counsel's decision to call a witness is a matter of trial strategy.**

Trial counsel raised both the possibility of [REDACTED] and [REDACTED] testifying and the nature of their testimony. The decision to call a witness is presumed a matter of trial strategy.<sup>146</sup> "The failure to call a witness only constitutes ineffective assistance if it deprives defendant of a substantial defense."<sup>147</sup> A defense is substantial if it would have affected the outcome of the trial.<sup>148</sup> Moreover, "[a] defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel."<sup>149</sup> The defendant must support his claim with an affidavit or an offer of proof.<sup>150</sup>

Defendant has not provided support for his claim that trial counsel should have called [REDACTED] as a witness. Defendant's Brief on Appeal includes material not of record.<sup>151</sup> Defendant references

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<sup>146</sup> *Seals, supra* at 17. See *People v Meissner*, 294 Mich App 438; 812 NW2d 37 (2011) (failing to subpoena evidence and failing to interview witness is within defense counsel's decision regarding which witnesses to call and presumed to be sound trial strategy.').

<sup>147</sup> *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

<sup>148</sup> *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990) (citation omitted).

<sup>149</sup> *Hoag, supra* at 6.

<sup>150</sup> *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001), citing *Hoag, supra* at 6.

<sup>151</sup> *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992) (citation omitted) ("this Court's review is limited to the lower court record").

a DVD interview of [REDACTED] but did not provide the DVD interview in the trial court for the Motion for New Trial or the Brief on Appeal. It is not of record and, therefore, it cannot be used to support defendant's claim.<sup>152</sup>

Regardless, the record is clear that trial counsel chose not to call [REDACTED] as a matter of trial strategy. A defendant bears the burden of overcoming the presumption that the challenged action is trial strategy; this burden includes establishing evidentiary support for his claim and excluding "hypotheses consistent with the view that his trial lawyer represented him adequately."<sup>153</sup> Throughout the trial, trial counsel stated that he may call [REDACTED] a child with a disability, to testify that the victim never told her about any incident with defendant, contrary to the victim's testimony.<sup>154</sup> The trial court stated that the Prosecutor indicated that if trial counsel called [REDACTED] as a witness then the People would be permitted to call A [REDACTED] mother as a witness to impeach A [REDACTED]. According to the record, [REDACTED] mother would testify that [REDACTED] repeated to her what the victim alleged she told [REDACTED].<sup>156</sup> Accordingly, trial counsel did not call [REDACTED] because he knew her testimony would be discredited.

Even if this Court finds that trial counsel's decision to not call [REDACTED] as a witness was not a matter of trial strategy, defendant has not shown that [REDACTED] testimony would have changed the outcome of the proceedings. Because [REDACTED] mother would have impeached [REDACTED] testimony

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<sup>152</sup> Defendant's Brief on Appeal, 21.

<sup>153</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Hoag*, *supra* at 6.

<sup>154</sup> 6/2, 226-227.

<sup>155</sup> 6/2, 227.

<sup>156</sup> 6/1, Vol. I, 7; 6/6, 95; 6/2, 227.

and corroborated the victim's testimony, [REDACTED]'s testimony would not have changed the outcome of the proceedings.

Next, trial counsel's decision to not call [REDACTED] as a witness was also a matter of trial strategy. Defendant fails to provide factual support for his claim because the affidavit attached to defendant's Brief on Appeal is not of the potential witness, [REDACTED] but of a private investigator, which is inadmissible hearsay.<sup>157</sup> Regardless, trial counsel was informed that if [REDACTED] were to testify, it would be in corroboration of the victim's testimony. Trial counsel repeatedly argued for permission to argue [REDACTED] absence from the People's case.<sup>158</sup> Trial counsel believed that [REDACTED]'s absence was more favorable than her potential testimony corroborating the victim's testimony. Therefore, trial counsel's decision to not call [REDACTED] was a matter of trial strategy.

Moreover, defendant fails to show that [REDACTED]'s potential testimony would have provided him with a substantial defense. The investigator's affidavit indicates that the victim told [REDACTED] that both the victim's mother and defendant "looked at the victim's vagina to see if the victim was a virgin,"<sup>159</sup> a separate incident, which was not the basis for the charged offenses. The account does not provide a substantial defense; rather, the statement, attributed to [REDACTED] corroborates part of the victim's testimony. Trial counsel chose not to call [REDACTED] as a matter of trial strategy and even if called as a witness she would not have provided defendant with a substantial defense.

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<sup>157</sup> 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).

<sup>158</sup> 6/2, 223-228; 6/6, 90-96.

<sup>159</sup> Defendant's Exhibit A.

**C. Defendant decided to not have separate trials and to have only one jury.**

Generally, whether two or more defendants jointly indicted for any criminal offense shall be tried separately or jointly is in the discretion of the trial court.<sup>160</sup> “On a defendant’s motion, the court must sever the trial of [a] defendant on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.”<sup>161</sup> Severance is mandated only when a “defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.”<sup>162</sup> Potentially reversible prejudice may occur “when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant.”<sup>163</sup> A defendant’s “failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.”<sup>164</sup>

Defendant waived any claim of error. After considering whether to request a separate jury, defendant decided to have a joint trial with one jury. On appeal, defendant argues that Amanda Doss, a case worker from Child Protective Services (CPS), was called by the People to prove the charges against the codefendant, Chrystal [REDACTED], and would not have been called as a witness against

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<sup>160</sup> MCL 768.5.

<sup>161</sup> MCR 6.121(c).

<sup>162</sup> *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

<sup>163</sup> *Hana*, *supra* at 347 n 7, citing *Zafiro v US*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993).

<sup>164</sup> *Hana*, *supra* at 346-347.

him. Doss's testimony was relevant to both defendants' cases. The parties addressed this very issue at the Motion Hearing. The parties agreed that separate juries were not necessary.<sup>165</sup> Trial counsel stated that he had spoken with defendant and that "it is his feeling that he is best served by one jury. He sees no conflict in the statement that Mrs. [REDACTED] made to Ms. Doss, as reflecting upon him. Therefore, he is not asking for a separate jury."<sup>166</sup> Additionally, before trial began the prosecutor placed on the record that she intended to call Doss as a witness, and that she intended to admit both defendants' statements made to Doss through Doss's testimony.<sup>167</sup> "A party cannot request a certain action of the trial court then argue on appeal that the action was error."<sup>168</sup> Therefore, defendant cannot now claim that his trial counsel should have requested a separate jury.

Even if this Court considers the issue, it should reject defendant's claim that CPS removed the children based on the codefendant's discussions with the victim and because the codefendant drove the victim to the interview.<sup>169</sup> Defendant argues this was prejudicial to him. But Doss did not decide that the children were not going home until after the victim's disclosures at the Kid's Talk interview. This is clear because before the interview began, Doss had arranged with codefendant for defendant's father to pick up the victim.<sup>170</sup> Also, the victim testified that the day before the Kid's

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<sup>165</sup> 5/20, 22.

<sup>166</sup> *Id.*

<sup>167</sup> 6/1, Vol. I, 13-14.

<sup>168</sup> *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995) (citation omitted). See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (A defendant cannot acquiesce to the trial court's handling of the issue and then raise the issue as error on appeal).

<sup>169</sup> Defendant's Brief on Appeal, 35.

<sup>170</sup> 6/1, Vol. II, 20.

Talk interview both codefendant and defendant told her “what they said to say, happened.”<sup>171</sup> The record indicates, according to Doss’s testimony, that the victim and her brother were not allowed to return with defendants because “[a]fter the disclosure [the victim] made at Kid’s Talk, in speaking with her, she was very afraid to go home. She was very afraid that there would be repercussions for her telling the truth. She felt unsafe.”<sup>172</sup> Therefore, defendant fails to show that fact that the children were removed from codefendant and defendant’s<sup>173</sup> custody was unnecessarily prejudicial to him as it was also relevant to his case.

The fact that Doss also testified that the children were removed from the home is not limited to codefendant and the charges of obstruction of justice, but is also relevant to defendant’s case.<sup>174</sup> Defendant states “the jury may have believed that the allegations D.P. reported during the interview about Mr. Overton caused the children to be removed,”<sup>175</sup> which may be possible because according to Doss’s testimony, the victim “was very afraid to go home” and “she was very afraid that there would be repercussions for her telling the truth. She felt unsafe.”<sup>176</sup> Doss did not testify that this was solely because of codefendant’s actions, but instead was based on the disclosures the victim made

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<sup>171</sup> 6/2, 78, 80.

<sup>172</sup> *Id.*

<sup>173</sup> 6/2, 74. The victim was living with both codefendant and defendant at the time.

<sup>174</sup> Even if this Court finds that Doss’s testimony was not relevant reversal is not required because “[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.” *Hana, supra* at 349 (citation omitted).

<sup>175</sup> Defendant’s Brief on Appeal, 35.

<sup>176</sup> 6/1, Vol. II, 20.

to Doss.<sup>177</sup> Moreover, the victim testified that the day before the Kid's Talk interview both codefendant and defendant told her "what they said to say, happened."<sup>178</sup> Therefore, the fact the children were removed from the home also relates to defendant.

Additionally, contrary to defendant's assertions, Doss's testimony was relevant to defendant's case. Relevance is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>179</sup> Doss testified that after the Kid's Talk interview she had a telephone conversation with defendant, in which he admitted to the following: he had the victim put her finger in her vagina at his direction; he shaved her pubic hair; he checked her vaginal area multiple times; and he checked her underwear to see if they fit.<sup>180</sup> Doss's testimony makes the fact that defendant committed the charged crimes more probable than it would be without the evidence.

Next, defendant argues<sup>181</sup> that the victim's testimony that codefendant said that she "shouldn't say what happened" and that she should "word stuff differently, that he was just checking,"<sup>182</sup> was inadmissible hearsay against defendant. "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

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<sup>177</sup> 6/1, Vol. II, 20.

<sup>178</sup> 6/2, 78, 80.

<sup>179</sup> MRE 401.

<sup>180</sup> 6/1, Vol. II, 26-27.

<sup>181</sup> Defendant's Brief on Appeal, 35.

<sup>182</sup> 6/2, 78.

truth of the matter asserted.”<sup>183</sup> “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.”<sup>184</sup> The victim’s testimony that codefendant said that she “shouldn’t say what happened” and that she should “word stuff differently, that he was just checking,”<sup>185</sup> were commands, “not an assertion, and cannot be hearsay because it doesn’t qualify as a ‘statement.’”<sup>186</sup>

Even if this Court finds that the statements made by the codefendant to the victim were inadmissible hearsay against defendant, the exclusion would not have changed the outcome of the proceedings. Had the statements been excluded it would not have made the People’s case against defendant less persuasive. The jury still had the victim’s remaining testimony of what occurred, defendant’s testimony corroborating part of what the victim alleged had occurred, defendant’s admissions through Doss, and John ██████ testimony. Therefore, even if the statements were excluded the outcome of the proceedings would not have been different.

Regardless, the trial court cured any error by giving the following instruction:

You should consider each defendant separately. Each is entitled to have his or her case decided on the evidence and the law that applies to him or her. *If any evidence is limited to one Defendant, you should not consider it as to the other.* The prosecution has introduced evidence of a statement it claims *the Defendant* made. Before you may consider such out of court statements *against the defendant*, you

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<sup>183</sup> MRE 801(c).

<sup>184</sup> MRE 801(a).

<sup>185</sup> 6/2, 78.

<sup>186</sup> *People v Jones*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998).

must first find the Defendant actually made the statement as given to you.<sup>187</sup>

Jurors are presumed to follow the trial judge's instructions.<sup>188</sup> The instruction shows that if evidence is limited to one defendant it may not be considered towards the other defendant. Accordingly, a defendant's out-of-court statement may only be considered against the defendant who made the out-of-court statement and may not be considered against or for the other defendant. Therefore, the trial court properly cured any prejudice by giving an instruction to the jury regarding codefendant's statement to the victim.

**D. Doss, a lay person, did not testify to the ultimate issue of guilt.**

Trial counsel cannot be faulted for failing to raise an objection that would have been futile.<sup>189</sup> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."<sup>190</sup> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."<sup>191</sup> Both an expert and a lay witness may express an opinion on the ultimate issue.<sup>192</sup> However, a lay witness

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<sup>187</sup> 6/6, 137-138.

<sup>188</sup> *People v Mesik (on reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

<sup>189</sup> *Cline, supra* at 641-642, quoting *Fike, supra* at 182.

<sup>190</sup> MRE 701.

<sup>191</sup> MRE 704.

<sup>192</sup> *People v Drossart*, 99 Mich App 66, 73; 297 NW2d 863 (1980).

may express an opinion on the ultimate issue of case if the witness's opinion is based on the "facts and circumstances within [his or her] own knowledge."<sup>193</sup>

Doss did not express an opinion on the ultimate issue of guilt, and properly stated her opinion as a lay witness.<sup>194</sup> The ultimate issue was whether defendant's actions were for a sexual purpose- which is what was to be decided by the trier of fact; not whether defendant was acting as a parent. The following is Doss's testimony on direct examination, in relationship to the issues defendant raises:

*Q.* Did she make excuses for him?

*A.* She stated that it was his(sic) helping her.

*Q.* That is what she said?

*A.* Yes. She stated that it was him being a parent to [the victim].

*Q.* Was your opinion the same?

*A.* No, it was not.

*Q.* So, her attitude was, he was just helping her and that is what parents do?

*A.* Correct.<sup>195</sup>

Doss testified as an investigator for CPS. Her testimony was rationally based on her perception and set forth the steps that she took in her investigation and the information received. If Doss did not see a problem with defendant's actions the investigation would not have continued. The dialogue merely addresses whether Doss agreed with codefendant on whether defendant was acting as a parent, Doss did not conclude that defendant's actions were for a sexual purpose as to conclude guilt.

Even if Doss's testimony was an opinion on the ultimate issue, the testimony was admissible. Doss testified as a lay person to her opinion whether defendant's actions were parental in nature.

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<sup>193</sup> *Drossart, supra* at 73, citing *People v Cole*, 382 Mich 695, 707; 172 NW2d 354 (1969).

<sup>194</sup> Defendant's Brief on Appeal, 36.

<sup>195</sup> 6/1, Vol. II, 25-26.

Her testimony was based on information she received up until the point she was having the conversation with codefendant- the prosecutor asked Doss in the past tense. Regardless, trial counsel's lack of objection may be seen as a matter of trial strategy to not call attention to Doss' statement. Even if trial counsel had objected to Doss's testimony, the testimony did not affect the outcome of the proceedings, as the jury found that defendant acted with a sexual purpose.<sup>196</sup>

**E. Defendant, as a lay person, may testify to an ultimate issue.**

Next, defendant argues that his own testimony was inadmissible because he was not qualified as an expert. Defendant also argues that the questions asked of him were irrelevant and misled the jury, but fails to cite case law in support of this position. A defendant cannot state a position and leave it to the courts to provide the case law.<sup>197</sup> Therefore, defendant has abandoned this issue.

Even if defendant's claim is considered, defendant did not have to be qualified as an expert to testify to the following on cross-examination:

*Q.* Now, you attended the police academy, where you could become a police officer, right?

*A.* Yes, Ma'am.

*Q.* Some of the curriculum involved teaching about the Criminal Sexual Conduct Law, right?

*A.* Yes.

*Q.* So, you are well aware, that if a person penetrates a child, that is illegal, right. Do you know that.

*A.* Yeah.

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<sup>196</sup> See *People v Mesik (on reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009) (jurors are presumed to follow the trial judge's instructions).

<sup>197</sup> *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998), citing *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Q. You are aware if a person touches the private genital area of a little girl, that is illegal, right?

A. Yeah.

Q. And you know that if a person forces a child to spread her legs and spread her vagina open, so that he can look at it. You know that is illegal, right?

A. Sure.

Q. So, you have got more information about the law, than any member of the general public does. Is that fair to say?

A. Yes.<sup>198</sup>

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”<sup>199</sup> Defendant was testifying to what he knew. The prosecutor laid the foundation to establish defendant’s knowledge when she asked defendant if he learned about “the criminal sexual conduct law,” to which defendant responded “[yes].”<sup>200</sup> Defendant properly testified as a lay person based on his personal knowledge.

Next, the questions were relevant. Relevance is defined as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>201</sup> All relevant evidence is admissible unless “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>202</sup>

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<sup>198</sup> 6/2, 192.

<sup>199</sup> MRE 602.

<sup>200</sup> 6/2, 192.

<sup>201</sup> MRE 401.

<sup>202</sup> MRE 402; MRE 403.

The questions at issue established defendant's level of knowledge on the law of criminal sexual conduct. Defendant's defense was that his actions were done within the parental capacity. The testimony indicates that the Prosecutor was trying to show that defendant's actions were outside defendant's parental capacity; they were illegal. The fact that defendant was aware that it is illegal "if a person touches the private genital area of a little girl" and "if a person forces a child to spread her legs and spread her vagina open so that he can look at it," makes the fact that defendant acted with a sexual purpose more probable and, therefore, relevant. Moreover, the question "if a person penetrates a child, that is illegal right?" is also relevant because the prosecutor argued that defendant engaged in sexual penetration when defendant forced the victim to insert her finger in her vagina. Contrary to defendant's assertions,<sup>203</sup> these questions did not mislead the jury because they were supported by the record.

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<sup>203</sup> Defendant's Brief on Appeal, 37.

## VII.

**The rule of completeness applies when a writing or recorded statement or part thereof is introduced by a party. No part of the taped interview was admitted into evidence or presented to the jury. The trial court did not abuse its discretion by excluding the taped interview and denying defendant's motion for a new trial.**

### Standard of Review

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial.<sup>204</sup> An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions.<sup>205</sup>

Defendant asserts that the trial court erred by not admitting defendant's taped interview. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.<sup>206</sup> Because defendant moved for the admission of the taped interview, he properly preserved this issue; this Court reviews defendant's preserved claim for a miscarriage of justice. "[T]he defendant has the burden of establishing a miscarriage of justice under a 'more probable than not' standard in order to justify reversing a conviction."<sup>207</sup> An error is outcome-determinative if it undermines the reliability of the verdict.<sup>208</sup>

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<sup>204</sup> *Rao, supra* at 279, citing *Lemmon, supra* at 648 n 27.

<sup>205</sup> *Rao, supra* at 279, citing *Babcock, supra* at 269.

<sup>206</sup> *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

<sup>207</sup> *People v Houthoofd*, 487 Mich 568, 587; 790 NW2d 315 (2010), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

<sup>208</sup> *Houthoofd, supra* at 587, quoting *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

## Discussion

MRE 106 only applies when “a writing or recorded statement or part thereof is introduced by a party.” As with the identical federal rule of evidence, FRE 106, MRE 106 does not apply to oral conversations.<sup>209</sup> In this case, the People simply questioned<sup>210</sup> defendant about oral statements he made to Detective Galeski.<sup>211</sup>

Trial counsel requested in a motion in limine that the taped interview between defendant and Detective Galeski be played and entered into evidence.<sup>212</sup> The prosecution argued that only the People can admit the tape because the tape is hearsay if admitted by trial counsel but not hearsay if admitted by the People as statements against interest.<sup>213</sup> Both parties agreed by stipulation that the tape would not be played unless the People questioned Detective Galeski about statements made on the taped interview.<sup>214</sup> Trial counsel then raised the issue about certain questions, not the admission of the taped interview, that may be asked of Detective Galeski. Trial counsel argued that Detective Galeski’s opinions about the investigation should be admitted at trial.<sup>215</sup> The trial court held that

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<sup>209</sup> Committee Note to MRE 106, 399 Mich 962 (1977) (recognizing that MRE 106 deviated from prior Michigan law applying the rule of completeness to oral conversations; *US v Ortega*, 203 F3d 675, 682 (CA 9, 2000)).

<sup>210</sup> 6/2, 207-208.

<sup>211</sup> Defendant alleges that throughout his trial “various answers that Mr. Overton gave to questions asked during the police interview were admitted.” Defendant’s Brief on Appeal, 39. But fails to cite to the record in support of his assertion and, therefore, has abandoned this claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

<sup>212</sup> 5/20, 9-10.

<sup>213</sup> 5/20, 10.

<sup>214</sup> *Id.*

<sup>215</sup> 6/1, Vol. I, 138-139, 141.

Detective Galeski's statements "would not be highly relevant to the defense and very prejudicial to the complainant."<sup>216</sup> The taped interview was not admitted into evidence nor was any part of it played. Because no written or recorded statement was admitted into evidence, MRE 106 did not apply and the trial court did not abuse its discretion.<sup>217</sup>

Furthermore, the Prosecutor did not elicit the contents of the interview between Detective Gaeliski and defendant and merely asked "did you interview Randall Overton" and Detective Galeski responded, "[y]es, I did."<sup>218</sup> Trial counsel, during cross-examination of Detective Gaeliski, referenced the interview between defendant and Detective Galeski, but also did not elicit the contents of the taped interview.<sup>219</sup> Because no part of the taped interview was introduced at trial by the People MRE 106 did not apply and the trial court properly excluded the taped interview.

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<sup>216</sup> 6/1, Vol. I, 143.

<sup>217</sup> *People v Mark Allen Porter*, unpublished per curiam opinion of the Court of Appeals, issued March 16, 1999 (Docket No. 202855) (attached as Appendix A), Slip Op p 2, n 2. (MRE 106 did not apply because the prosecutor did not introduce either a written or recorded statement).

<sup>218</sup> 6/2, Vol. II, 140-142.

<sup>219</sup> 6/2, Vol. II, 148-149.

## VIII.

**A sentence mandated by the Legislature is presumed to be both proportional and valid. Defendant was convicted of first-degree CSC for instructing a 12-year-old girl to insert her finger in her vagina. Defendant fails to rebut the presumption that his sentence to the 25-year mandatory minimum is constitutional.**

### **Standard of Review**

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial.<sup>220</sup> An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions.<sup>221</sup> This Court reviews a defendant's claim that the sentence is cruel and unusual punishment de novo.<sup>222</sup> The defendant, however, bears the burden of overcoming the presumption of proportionality, when the minimum sentence is within the appropriate guidelines range.<sup>223</sup>

### **Discussion**

The Eighth Amendment to the United States Constitution<sup>224</sup> and the Michigan Constitution<sup>223</sup> prohibit cruel or unusual punishment. A sentence mandated by the Legislature is presumed to be both proportional and valid.<sup>224</sup> When determining whether a punishment is cruel or unusual, this

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<sup>220</sup> *Rao, supra* at 279, citing *Lemmon, supra* at 648 n 27.

<sup>221</sup> *Rao, supra* at 279, citing *Babcock, supra* at 269.

<sup>222</sup> *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011).

<sup>223</sup> *People v Powell*, 278 Mich App 318, 324; 750 NW2d 607 (2008).

<sup>224</sup> US Const, Am VIII (prohibits "cruel and unusual").

<sup>223</sup> Const 1963, art 1, § 16 (prohibits "cruel or unusual").

<sup>224</sup> *People v Williams*, 189 Mich App 400, 407; 473 NW2d 727 (1991).

Court is to look at the “gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states.”<sup>225</sup>

Recently, *People v Brown* held that a sentence mandated by the Legislature under MCL 750.520b(2)(c), which mandates the penalty of life imprisonment without the possibility of parole for a defendant over the age of 17, who commits first-degree CSC involving a victim less than 13 years of age, is proportional and valid.<sup>226</sup> In addressing this issue, *Brown* reasoned that “the fact that the Legislature adopted harsher punishment for those crimes involving penetration of a victim under the age of 13, even for a first-time offense (life or any term of years but not less than 25 years; MCL 750.520b2(B)), indicates that such crimes are indeed grave.”<sup>227</sup> *Brown* found that other states permit life without the possibility for parole even for a first-time offense: South Carolina requires life in prison if the CSC offense involves a statutory aggravating circumstance and Louisiana mandates life in prison at hard labor without the possibility for parole for aggravated rape, which includes penetration of a minor, even for a first-time offense.<sup>228</sup>

This Court in *People v Benton* also recently held that the mandatory 25-year minimum sentence for first-degree CSC was not cruel or unusual punishment.<sup>229</sup> In *Benton*, the defendant was convicted of first-degree CSC for engaging in intercourse with a 12-year old male former student. *Benton*

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<sup>225</sup> *People v Brown*, 294 Mich App 377; 811 NW2d 531 (2011).

<sup>226</sup> *Brown*, *supra* at 389-390.

<sup>227</sup> *Brown*, *supra* at 390-391.

<sup>228</sup> *Brown*, *supra* at 391, citing SC Code Ann 16-3-655(D); LA R S 14:42D(1).

<sup>229</sup> *People v Benton*, 294 Mich App 191; 817 NW2d 599 (2011).

reasoned that the defendant was not considered less culpable than most persons convicted of first-degree CSC against a child victim and stated the following:

[T]he perpetration of sexual activity by an adult with a preteen victim is an offense that violates deeply ingrained social values of protecting children from sexual exploitation. Even when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences. The unique ramifications of sexual offenses against a child preclude a purely qualitative comparison of sentences for other offenses to assess whether the mandatory 25-year minimum sentence is unduly harsh.<sup>230</sup>

Just so here, with this 41-year-old defendant sexually abusing a vulnerable child, defendant's sentence is not cruel or unusual punishment. Defendant argues that his sentence is cruel or unusual because he is a less culpable offender, because he made the victim penetrate herself.<sup>231</sup> The Legislature defined sexual penetration as the following: "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."<sup>232</sup> Within this definition the Legislature included "any part of a person's body or of any object into the genital."

Defendant's conduct is considered sexual penetration under the statute. Because the Legislature contemplated part of a person's body or an object within the definition of penetration, the fact that defendant instructed the minor victim to expose herself fully and insert her finger into her vagina while he watched is sufficient. Therefore, defendant's act cannot be considered

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<sup>230</sup> *Benton, supra* at 206.

<sup>231</sup> Defendant's Brief on Appeal, 44.

<sup>232</sup> MCL 750.520a(r).

mitigating because the conduct is prohibited under the statute, and for which the 25-year sentence is mandated. Defendant fails to rebut the presumption that his mandatory-minimum sentence of 25-years for his first-degree CSC conviction is valid and proportional.

**Relief**

**WHEREFORE**, this Court should affirm defendant's convictions and sentence.

Respectfully submitted,

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