STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN WILLIAM SMITH,

Defendant-Appellant.

UNPUBLISHED
June 20, 2024

No. 363025
Ottawa Circuit Court
LC No. 20-043785-FC

Before: RICK, P.J., and JANSEN and LETICA, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] his jury-trial convictions of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and MCL 750.520b(2)(b). The trial court sentenced defendant to 25 to 50 years' imprisonment for each CSC-I conviction, to be served consecutively. Defendant argues on appeal that (1) his in-custody statements to police officers were involuntary and the product of coercive police interrogation; (2) his constitutional rights were violated because of ineffective assistance of counsel at trial; (3) the trial court improperly ordered his sentences to run consecutively without statutory authority; (4) his sentence was unreasonably harsh and disproportionate, as well as cruel and unusual punishment; and (5) the trial court erred in scoring various sentencing variables. We affirm.

I. FACTUAL BACKGROUND

This case arose when the victim told her friend and her friend's mother that defendant, her father, had been sexually assaulting her. The abuse began when the victim was 11 years old, and persisted for almost two years on a nearly daily basis. The abuse included multiple acts of digital and penile penetration of the victim's vagina while she was under the age of 13, photographing her private parts, watching pornographic videos with her, filming her while he sexually abused her, and controlling her activities in exchange for sexual acts. Police officers interviewed

[1] *People v Smith*, unpublished order of the Court of Appeals, entered February 14, 2023 (Docket No. 363025).

defendant at the local sheriff's office, and he made several incriminating statements and confessions. After trial, a jury convicted defendant of two CSC-I charges, and he was sentenced. Defendant now appeals.

II. ANALYSIS

A. VOLUNTARINESS OF DEFENDANT'S CONFESSION

Defendant first argues that his statements to law enforcement were involuntary and violated his due-process rights because they were the product of improper and coercive police interrogation.

Defendant challenged the use of his confession in a motion to suppress, and a *Walker*[2] hearing was held by the trial court, thereby preserving this issue on appeal. *People v Whitehead*, 238 Mich App 1, 7 n 5; 604 NW2d 737 (1999). This Court reviews a preserved issue concerning a trial court's ruling on a motion to suppress de novo. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). "Although this Court engages in a de novo review of the entire record, it will not disturb a trial court's factual findings unless those findings are clearly erroneous." *Id.* "A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake." *Id.*

The United States Constitution and the Michigan Constitution "guarantee that no person shall be compelled to be a witness against himself or herself." *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013), citing US Const, Am V; Const 1963, art 1, § 17. "Generally, a custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his or her freedom of action in any significant way." *Steele*, 292 Mich App at 316. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). A defendant's waiver of his *Miranda*[3] rights need not be explicit, but the circumstances must clearly and convincingly show that the defendant knowingly, intelligently, and voluntarily relinquished his rights. *People v Matthews*, 22 Mich App 619, 627; 178 NW2d 94 (1970).[4] "Whether a waiver was made knowingly and intelligently requires an inquiry into defendants [sic] level of understanding, irrespective of police conduct." *Gipson*, 287 Mich App at 265. A very basic understanding of his or her rights suffices. *Id.* The prosecutor must establish that a waiver was valid by a preponderance of the evidence. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

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[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Court of Appeals cases decided before November 1, 1990, are not binding. MCR 7.215(J)(1). Although this Court is not "strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990, those opinions are nonetheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019) (quotation marks and citation omitted).

1. LENIENCY

Regarding promises of leniency, the Michigan Supreme Court has stated that the proper test must determine whether there was a promise and whether that promise caused the confession. *People v Conte*, 421 Mich 704, 729; 365 NW2d 648 (1984). "[A] confession induced by a promise of leniency is involuntary and inadmissible." *Id*. at 743.

There is no indication in the record that police officers suggested the possibility of leniency to defendant if he gave a statement to them. There is also no indication that such a statement caused defendant to confess his crime. In fact, defendant failed to supply this Court with a recording of defendant's interview with the detective as requested. It was not until after oral argument that the prosecution, rather than defendant, provided encrypted files of both the full and redacted versions of the video. The failure of defendant to provide such evidence typically results in waiver. See MCR 7.210(C) (a party possessing any exhibits offered in evidence must file them with the trial court for the record on appeal); *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) (the defendant bears the burden of furnishing the reviewing court with a record to verify the factual basis of his arguments); *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003) (failure to provide this Court with the relevant record waives review). Regardless, defendant has failed to offer any factual support for any promise or suggestion of leniency from police officers. He provides no record citation as to when or how the detective allegedly promised him leniency. 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." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Consequently, defendant has failed to establish that police officers obtained his confession through a promise of leniency or that such a promise caused him to confess his wrongdoings.

We further note that only the redacted version of the interview was admitted at trial. As a general rule, "[a]ppeals to the Court of Appeals are heard on the original record," MCR 7.210(A), and the parties may not expand the record on appeal. *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013). Thus, the prosecution's production of the full, nonredacted version is an improper expansion of the lower court record which we will not consider. Although the redacted version of the interview video was admitted at trial, neither version was admitted into evidence during the *Walker* hearing. At oral argument, appellate defense counsel indicated that defendant's argument relied on what occurred during the *Walker* hearing, the interview video was not helpful to defendant, and she preferred to rely on the hearing transcript. However, defendant did not raise or make a leniency argument at the *Walker* hearing. The focus was on possible intoxication, and when the trial court asked counsel if there was anything else to address, defense counsel responded in the negative. Regardless, based on our conclusion that defendant's leniency argument is abandoned, we need not discuss the redacted version of defendant's police interview.

2. INTOXICATION

Intoxication from alcohol or other substances can affect a waiver's validity, but it is not dispositive. *Gipson*, 287 Mich App at 265. Whether a defendant's waiver was voluntary depends on the totality of the circumstances, whether the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will was overborne and his

capacity for self-determination critically impaired. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. at 334.]

The absence or presence of any of these factors is not necessarily conclusive on the issue of voluntariness. *Id*. Rather, admissibility hinges on whether the totality of the circumstances surrounding the confession indicate that it was freely and voluntarily made. *Id*. A court may also inquire into a defendant's overall mental and physical state. *Gipson*, 287 Mich App at 265.

Regarding the totality of the circumstances, the trial court considered the following factors at the *Walker* hearing: defendant's age; his education; his prior contact with police; the questioning's repeated and prolonged nature; the length of defendant's detention; police officers' advice to defendant regarding his *Miranda* rights; any unnecessary delay in bringing defendant before the trial court; any indication that defendant was injured, in ill health, deprived of food, deprived of sleep, or that any medical situation arose; and defendant's intoxication.

Regarding defendant's age and education, the trial court noted that defendant was 37 years old, intelligent, well educated, articulate, and did not suffer from any intellectual disabilities. Aside from some traffic stops, defendant had no unusual or antagonistic contacts with the police. The trial court stated that the length of defendant's questioning, which lasted approximately 90 to 120 minutes, was not long in the grand scheme of things. Regarding the length of defendant's detention, the trial court stated that defendant was not detained per se, and the amount of time that defendant was questioned was relatively brief. The parties do not dispute that police officers advised defendant of his *Miranda* rights. Although defendant was hungry, there was no indication that he was injured, in ill health, deprived of any required medical attention, or sleep deprived. There was no indication that defendant requested any food or drinks from police officers during the interview.

Lastly, regarding defendant's intoxication, defendant testified during the *Walker* hearing that he had three beers and five shots of tequila before the interview. Defendant indicated that he drank the beer earlier in the day and he drank the tequila later in the evening when he was cooking dinner. Defendant started cooking dinner at about 6:00 p.m. and the police officers came to defendant's house sometime between 6:30 and 7:00 p.m. Defendant stated that he was "starving" during the interview because he was cooking a late dinner and never had the opportunity to eat before the interview. The trial court stated that it was unsure whether the alcohol impaired defendant's conduct or judgment during the interview. Defendant described the interview room,

confirmed that he was given his *Miranda* warnings, and confirmed that the interview constituted a friendly conversation. Consequently, defendant's ability to comprehend where he was and what occurred was consistent with the police detective's account of the interview.

For these reasons, the trial court concluded that there was nothing to indicate that defendant's statements to police were involuntary. On the basis of the totality of the circumstances, there is nothing to indicate that police officers violated defendant's due-process rights during his interview. There is not "the slightest evidence that the defendant's confession was involuntarily extracted." See *Cipriano*, 431 Mich at 345. Defendant was apprised of his *Miranda* rights, and there is no evidence of coercion on the part of police officers. See *id*.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in a Standard 4 brief[5] that his state and federal constitutional rights were violated by ineffective assistance of counsel at trial.

Defendant failed to move for a new trial or request an evidentiary hearing in the trial court; therefore, his claim of ineffective assistance of counsel is not preserved. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). This Court reviews an unpreserved issue of ineffective assistance of counsel for mistakes apparent on the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

"To establish ineffective assistance of counsel, defendant must show (1) that defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's errors, a different outcome would have resulted." *People v Jackson*, 292 Mich App 583, 600-601; 808 NW2d 541 (2011). Effective assistance of counsel is strongly presumed, and the party claiming ineffectiveness must overcome this presumption. *People v Horn*, 279 Mich App 31, 37 n 2; 755 NW2d 212 (2008). When examining the effectiveness of counsel, reviewing courts must apply "a heavy measure of deference to counsel's judgments." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant argues that defense counsel was ineffective because of (1) his failure to move for a dismissal on the basis of the delay between the arrest and trial; (2) his personal agenda regarding his newly-formed law firm; (3) his failure to have an expert on defendant's alcoholism testify at the *Walker* hearing; (4) his failure to object to the admission of the interview video footage; and (5) his failure to strike two jurors who had been victims of domestic violence.

1. DELAY

A criminal defendant's right to a speedy trial is guaranteed by the federal and Michigan constitutions as well as by statute and court rule. US Const, Am VI; Const 1963, art 1, § 20; *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). To determine whether a defendant

[5] A "Standard 4" brief refers to a brief filed on behalf of an indigent criminal defendant under Michigan Supreme Court Administrative Order 2004-6, 471 Mich c, cii (2004).

has been denied his or her right to a speedy trial, this Court balances the following: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Williams*, 475 Mich at 261-262.

The delay period commences at the arrest of the defendant. *Id*. at 261. "[T]here is no set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim." *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009).[6] Additionally, a delay of more than 18 months is presumptively prejudicial to the defendant, and shifts the burden to the prosecution to prove a lack of prejudice. *Williams*, 475 Mich at 262. A presumptively prejudicial delay serves as a "triggering mechanism" and requires this Court to further inquire, by means of the other three factors, into whether a defendant was deprived of his right to a speedy trial. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). When a defendant stipulates to adjourned dates, any delay resulting from the stipulations is attributable to the defendant. See *People v Crawford*, 232 Mich App 608, 613-615; 591 NW2d 669 (1998).

Defendant was arrested on February 29, 2020, and the trial took place on March 15 and 16, 2022. Consequently, there was a $24^1/_2$-month delay from defendant's arrest to trial. See *Williams*, 475 Mich at 261. The parties set the initial date of the jury trial for October 7, 2020. During a pretrial competency hearing, the parties agreed to delay the date of the trial by at least 60 days, primarily because of delays involving defendant's request for competency evaluations. The parties set the new trial dates for late September 2021, over $11^1/_2$ months after the original trial date. On September 27, 2021, defendant stipulated to an adjournment of the late-September 2021 trial dates. The parties set new trial dates for mid-February 2022. This delayed the procedure by an additional $4^1/_2$ months. In January 2021, defendant again stipulated to an adjournment of the trial dates, and the parties set the final trial dates for mid-March 2022. In total, these delays indicated that at least 17 months of the delay was attributable to defendant. The remaining $7^1/_2$ months were likely attributable to someone or something other than defendant. Therefore, the delay fell well within the presumptively prejudicial period of 18 months. See *id*. There is also no indication in the record when or if defendant asserted his right to a speedy trial. A defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied this right. See *Simpson*, 207 Mich App at 564. Defendant also failed to explain how and whether he was prejudiced by the delay. Lastly, defendant has failed to establish a reasonable probability that, but for defense counsel's alleged errors, a different outcome at trial would have resulted. See *Jackson*, 292 Mich App at 601.

[6] Although defendant references the 180-day rule in his Standard 4 brief, it does not apply to defendant because he was not incarcerated on another offense at the time that the present charges were issued. See MCL 780.131(1) (a prison inmate with a pending criminal charge must be tried within 180 days of the Department of Corrections giving the prosecution notice of the inmate's imprisonment and requesting disposition).

2. PERSONAL AGENDA

Defendant argues that defense counsel provided ineffective assistance based on a personal agenda regarding his newly-established law firm. In support of his argument, defendant makes a number of claims that do not extend beyond mere allegation and personal opinion. Defendant has failed to provide any evidence or caselaw in support of his assertions. Moreover, defendant has failed to establish that defense counsel's conduct fell below an objective standard of reasonableness or a reasonable probability that the outcome of this case would have been different had it not been for defense counsel's personal agenda. See *id*.

3. EXPERT WITNESS

Defendant contends that defense counsel's failure to have an expert witness testify at the *Walker* hearing regarding defendant's alcoholism constituted ineffective assistance of counsel. Defendant has failed to explain how such an expert would have been relevant or outcome-determinative to this case. There is no evidence that the defendant's confession was involuntarily extracted. See *Cipriano*, 431 Mich at 345. Moreover, there is no clear indication that defendant's consumption of alcohol before his interrogation rendered his confession to police involuntary. Regarding the voluntariness of defendant's statements to police officers, defense counsel focused primarily on the coercive conduct of the police officers, not the alleged intoxication of defendant. This was a strategic decision. Although defense counsel's strategy ultimately failed, a failed strategy does not constitute deficient performance on the part of defense counsel. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). The fact remains that defendant has failed to establish that defense counsel's conduct fell below an objective standard of reasonableness. See *Jackson*, 292 Mich App at 600-601.

Defendant also failed to establish a reasonable probability that the outcome of this case would have been different had it not been for defense counsel's failed strategy. See *id*. The victim testified extensively regarding defendant's conduct, and her testimony did not need to be corroborated. See MCL 750.520h. Moreover, defendant admitted his wrongful conduct during his police interview and to his wife. Therefore, there was sufficient evidence to support his convictions.

4. VIDEO FOOTAGE AND JURORS

Lastly, defendant argues that defense counsel was ineffective for failing to object to the admission of video footage of defendant's police interview and for failing to strike two jurors who had been victims of domestic violence.

Defendant ignores the fact that defense counsel attempted to suppress his statements to police officers through his motion to suppress. Just because defense counsel's motion did not succeed does not establish that his conduct fell below an objective standard of reasonableness or that the trial's outcome would have been different. See *Jackson*, 292 Mich App at 600-601.

Regarding the two jurors, defendant does not explain how striking two victims of domestic violence from the jury pool would have been relevant to a case involving CSC-I offenses. Once again, 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." *Kelly*, 231 Mich App at 640-641.

Consequently, defendant has failed to establish that defense counsel provided ineffective assistance at trial.

C. SENTENCING

1. CONSECUTIVE SENTENCES

Defendant next argues that the trial court improperly ordered defendant's sentences to run consecutively without statutory authority.

To preserve a sentencing issue for appeal, the defendant must raise the issue at sentencing, in a motion for resentencing, or in a motion to remand. MCR 6.429(C); *People v Clark (On Remand)*, 315 Mich App 219, 223; 888 NW2d 309 (2016). In his motion to remand, defendant merely mentioned the fact that the trial court sentenced him to consecutive 25- to 50-year terms for each of his CSC-I convictions. Defendant failed to raise an argument concerning his consecutive sentence terms. Defendant also failed to raise this issue at sentencing or in any other motion. Consequently, defendant has not preserved this issue for appeal. This Court reviews "unpreserved constitutional issues for plain error affecting the defendant's substantial rights." *People v Wiley*, 324 Mich App 130, 150; 919 NW2d 802 (2018). Under the plain error standard, a defendant must establish that "(1) [an] error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id*. at 151 (quotation marks and citation omitted). To establish that plain error affected a defendant's substantial rights, "there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id*. (quotation marks and citation omitted). Reversal is required only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Id*. (quotation marks and citation omitted).

a. LEGISLATIVE AUTHORITY

In Michigan, concurrent sentencing is the norm. *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012). A trial court cannot impose consecutive sentences without authority from the Legislature. *People v Chambers*, 430 Mich 217, 222; 421 NW2d 903 (1988).

MCL 750.520b(3) states that a trial court may "order a term of imprisonment . . . to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." The phrase "same transaction" has not been statutorily defined. *Ryan*, 295 Mich App at 402. However, the Michigan Supreme Court has clarified that crimes committed in a continuous time sequence constitute crimes committed in the same transaction. *People v White*, 390 Mich 245, 259; 212 NW2d 222 (1973), overruled on other grounds *People v Nutt*, 469 Mich 565, 568; 677 NW2d 1 (2004). For example, in *Ryan*, 295 Mich App at 403, this Court concluded that sexual penetrations forming two of the defendant's convictions arose from the same transaction and "grew out of a continuous time sequence in which the act of vaginal intercourse was immediately followed by the act of fellatio." Nevertheless, "an ongoing course of sexually

abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction." *People v Bailey*, 310 Mich App 703, 725; 873 NW2d 855 (2015).

In this case, defendant was convicted on both charges of CSC-I. One of the convictions arose from defendant's digital penetration of the victim's vagina, and the other conviction arose from his penile penetration. The victim testified that defendant would text her or tell her through the indoor surveillance camera to come upstairs to his bedroom where he would penetrate her vagina with his penis, kiss her, and put his hands into her vagina. The victim indicated that this happened to her on more than one occasion. Although the victim did not name any specific date on which digital and penile penetrations occurred, she clearly stated that, on certain occasions, defendant abused her in both ways at the same time. As such, the evidence indicates that the charged sexual penetrations arose from the same transaction and "grew out of a continuous time sequence." See *Ryan*, 295 Mich App at 403. In other words, these abusive penetrative acts were not merely part of an ongoing course of sexually abusive conduct. See *Bailey*, 310 Mich at 725.

For these reasons, MCL 750.520b(3) provided the trial court with discretionary authority to order that defendant's sentences be served consecutively.

b. JUSTIFICATION

When the Legislature has authorized, but not mandated, consecutive sentencing, the trial court must "articulate on the record the reasons for each consecutive sentence imposed." *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). The rationale must be sufficiently particularized for appellate review. *Id*. at 664-665. These particularized reasons must entail references "to the specific offenses and the defendant." *Id*. at 666. A trial court may not speak only in general terms when imposing consecutive sentencing on a defendant. See *id*.

In the present case, the trial court noted that defendant viewed his own daughter as his girlfriend, he described each rape as "respectful," photographed the victim's private parts, raped her many times while she was under the age of 13, watched pornographic videos with her, filmed her when he raped her, controlled her activities through his sexual desires, and attempted to manipulate his family into persuading the victim to lie. The trial court described defendant as a proverbial wolf in sheep's clothing who would use anyone, including his own daughter, to satisfy his perverted sexual desires. The trial court concluded that if any case warranted consecutive sentencing, it was this case. These facts established that the trial court justified its consecutive sentence with particularized reasons that referenced the specific offenses and defendant. See *id*.

Therefore, defendant has failed to establish that the trial court plainly erred when it imposed consecutive sentences.[7]

[7] Consequently, any objection raised by defense counsel would have been futile and would not have altered the outcome of the case. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

2. PROPORTIONALITY

Defendant also argues that he is entitled to resentencing because his sentence was unreasonably harsh and disproportionate.

"[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). Such a review requires an examination whether the trial court abused its discretion by "violating the principle of proportionality." *Id*. at 477. Courts review a sentence for reasonableness without regard to whether the trial court sentenced a defendant within the guidelines; whether a sentence is reasonable depends on whether it is proportionate to the "seriousness of the circumstances surrounding the offense and offender." *People v Posey*, 512 Mich 317, 325; 1 NW3d 101 (2023). Under this standard, courts may not render any decisions that fall outside the range of reasonable and principled outcomes. *People v Odom*, 327 Mich App 297, 303; 933 NW2d 719 (2019). Such decisions include those that are "arbitrary or capricious." *People v Grant*, 329 Mich App 626, 634-635; 944 NW2d 172 (2019).

Although the sentencing guidelines are no longer mandatory, the Michigan Supreme Court has held that "appellate courts must review all sentences for reasonableness . . . ." *Posey*, 512 Mich at 352. The Court also stated that every sentence "should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). In determining a sentence's reasonableness, appellate courts must look to "whether the sentence is proportionate to the seriousness of the matter." *Posey*, 512 Mich at 352. The legislative guidelines "represent the actual sentencing practices of the judiciary, and . . . [are] the best 'barometer' of where on the continuum from the least to the most threatening circumstances a given case falls." *People v Milbourn*, 435 Mich 630, 656; 461 NW2d 1 (1990). Overall, "the guidelines reflect the relative seriousness of the different combinations of offense and offender characteristics." *Id*. at 658.

Sentences imposed by a trial court must be proportionate to the offender and to the gravity of the offense. See *Steanhouse*, 500 Mich at 460. This Court "may" consider the following, nonexhaustive list of factors when determining a sentence's proportionality:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*People v Lampe*, 327 Mich App 104, 126; 933 NW2d 314 (2019) (quotation marks and citation omitted).]

Consequently, "[w]hen making this determination and sentencing a defendant, a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (quotation marks and citations omitted).

This case involved the abuse of a minor victim by her biological father. The offenses lasted for nearly two years and began when the victim was just 11 years old. Defendant expressed his remorse to his family and possibly some potential for rehabilitation. However, defendant's remorse failed to undue the hardship suffered by the victim. In her statement at sentencing, the victim told defendant that he traumatized her, made her feel sick and cry, and made her hate herself. She had to attend therapy to deal with her depression and anxiety. She described herself as lost, broken, and scared. The hardship endured by the victim was further revealed by the fact that, before the abuse, the victim enjoyed a very strong parent-child relationship with her father.

The trial court stated that defendant viewed his own daughter as his girlfriend and committed multiple abusive sexual acts with her, which included photographing her private parts, raping her many times while she was under the age of 13, watching pornographic videos with her, filming her while he raped her, and controlling her activities through his sexual desires. The trial court described defendant as a proverbial wolf in sheep's clothing and a danger to his family. For these reasons, the trial court sentenced defendant to two 300-to-600-month consecutive prison terms for his CSC-I convictions. Defendant's recommended guidelines range was 135 to 225 months. See MCL 777.16y (designating CSC-I as a Class A felony); MCL 777.62 (providing the minimum sentence range for Class A felonies). However, because defendant's conduct was "committed by an individual 17 years of age or older against an individual less than 13 years of age," his crime was punishable by "imprisonment for life or any term of years, but not less than 25 years." MCL 750.520b(2)(b).

Considering the extent of suffering caused by defendant, especially to the victim—an innocent preteen girl, who had every reason to feel safe in her own home, the defendant's remorse, even if sincere, can provide little to no comfort to a child whose innocence he stole forever, and who will have to live with the consequences of her father's actions her entire life. Therefore, the trial court's sentence was proportional to the offender and his offense.

3. CRUEL OR UNUSUAL PUNISHMENT

Defendant argues in this Standard 4 brief that his previous drug convictions did not involve any violent criminal acts, making the trial court's 25-year minimum sentence for his first instance of felonious violence grossly disproportionate.

This Court's review of defendant's claim that the trial court's sentences constituted cruel or unusual punishment are limited to plain error affecting defendant's substantial rights because defendant did not raise this claim in the trial court. *People v Lymon*, 342 Mich App 46, 62; 993 NW2d 24 (2022), lv pending. "A statute is presumed to be constitutional, and courts will construe a statute as constitutional unless its unconstitutionality is plainly apparent." *People v Malone (On Remand)*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 331903); slip op at 4. "The party challenging the statute's constitutionality has the burden of proving its invalidity." *Id*. "When a party asserts a facial challenge to the constitutionality of a statute, the party must demonstrate that no circumstances exist under which the statute would be valid." *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012).

"The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const,

Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). If a punishment satisfies the Michigan Constitution's restrictions on cruel or unusual punishment, it necessarily satisfies the more lenient requirements of the United States Constitution. *Id*. The Michigan Supreme Court has stated that, generally speaking, sentences "should be tailored to the particular circumstances of the case and the offender in an effort to balance society's need for protection and its interest in maximizing the offender's rehabilitative potential." *McFarlin*, 389 Mich at 574. For determining whether a punishment is cruel or unusual, courts examine whether the punishment was unjustifiably disproportionate to the offense by considering the following factors:

> (1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation. [*Lymon*, 342 Mich App at 82.]

As noted, the Legislature has unequivocally provided that "[f]or a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age," CSC-I is punishable by "imprisonment for life or any term of years, but not less than 25 years." MCL 750.520b(2)(b). The Michigan Supreme Court clarified that, for MCL 750.520b(2)(b) to apply, the defendant's age must be charged by the prosecution and the jury must convict the defendant of those charges. *People v Beck*, 510 Mich 1, 28-29; 987 NW2d 1 (2022). In this case, the prosecution charged defendant with two counts of CSC-I and, under both counts, charged that he engaged in CSC-I with a child under 13 years of age and he was 17 years or older. The jury convicted defendant on both CSC-I charges. Therefore, the mandatory 25-year minimum sentence of MCL 750.520b(2)(b) applied to defendant.

This Court has conclusively addressed the issue whether the 25-year minimum sentence constitutes cruel or unusual punishment. *Benton*, 294 Mich App at 203, 207. In *Benton*, this Court weighed the constitutionality of the 25-year minimum sentence according to the first three cruel or unusual punishment factors. *Id*. at 203-207. Regarding the second and third factors, this Court stated that the perpetration of sexual activity with a preteen victim is an offense that violates "deeply ingrained social values of protecting children from sexual exploitation." *Id*. at 206. Even in the absence of palpable physical injury or an overtly coercive sexual act, sexual abuse of children can cause "substantial long-term psychological effect" and "far-reaching social consequences." *Id*. Therefore, "[t]he 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." *Id*. Moreover, this Court concluded that, according to its research, several other states have enacted laws that impose a mandatory 25-year minimum sentence for an adult offender who commits a sexual offense with a preteen victim, notwithstanding the use of force or violence or lack thereof. See *id*.

Regarding the first factor, this Court has long held that a child's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct. *Id*. at 205. The *Benton* defendant was a former elementary school teacher who engaged in sexual intercourse with a 12-year-old former student. *Id*. at 194. The defendant engaged in sexual acts with a vulnerable victim, whom she invited to participate in activities that allowed her to isolate him in

her home and gradually introduce physical as well as emotional intimacy into their relationship. *Id*. at 205-206. This intimacy eventually led to sexual intercourse. *Id*. at 206. This Court stated that the victim's alleged acquiescence to defendant's conduct cannot be considered a mitigating factor, given the child's immaturity and innocence. *Id*. For these reasons, this Court concluded that defendant's 25-year minimum sentence was not unconstitutionally cruel or unusual. *Id*. at 207.

As previously stated, defendant challenges his 25-year minimum sentence solely on the basis of the penalty's harshness relative to the offense's gravity. See *Lymon*, 342 Mich App at 82. Defendant rightly points out that his CSC-I convictions mark his first offenses involving felonious acts. Defendant's criminal history only entails one misdemeanor. Regardless, defendant's argument ignores the fact that statutes are presumed to be constitutional, and Michigan courts must construe them as such unless their unconstitutionality is clearly apparent. See *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009). Moreover, the gravity of defendant's offense was at least as great as that of the offense committed in *Benton*.

In *Benton*, 294 Mich App at 194, the defendant was a former high school teacher and the victim was a 12-year-old student. The sexual offenses took place in the defendant's house and likely did not involve any force or coercion. *Id*. at 205-206. In the present case, defendant was the victim's father and the sexual offenses took place in the victim's own house, which she coinhabited with defendant and the rest of her family. Like the *Benton* victim, the present victim was 11 years old when the abuse began and, therefore, likely possessed the same level of maturity and vulnerability as the *Benton* victim if not more, given that she previously had a close relationship with her father and had more reason to trust him than the *Benton* victim had to trust his assailant. At sentencing, the victim stated that being raped by her father was a traumatic and awful experience. Even when people tried to comfort and support her, she felt embarrassed and ashamed. Speaking directly to defendant, she said that he traumatized her. She had to attend therapy to deal with the depression and anxiety that resulted from defendant's abuse.

In light of these tragic revelations and statements, the trial court's sentence of defendant to a mandatory minimum of 25 years did not constitute cruel or unusual punishment.

4. OFFENSE VARIABLES

Lastly, defendant argues in his Standard 4 brief that the trial court erroneously assigned defendant points under offense variables (OVs) 3, 11, and 13, as well as prior offense variable (PRV) 7.

When the trial court inquired at sentencing whether defendant had any comments on sentencing, defense counsel stated that he had "no additions or corrections" to the presentence investigation report. Likewise, defendant himself also confirmed that he had an opportunity to review the presentence investigation report and he had no additions or corrections. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (quotation marks and citation omitted). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those

rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). Accordingly, we deem this issue waived and decline to address it.

Affirmed.

/s/ Michelle M. Rick
/s/ Kathleen Jansen
/s/ Anica Letica