

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN J. SUTHERLAND,

Defendant-Appellant.

---

UNPUBLISHED

April 8, 1997

No. 178824

Oakland Circuit Court

LC Nos. 93-128452;

93-128453;

93-128454;

94-131755

Before: Doctoroff, P.J. and Michael J. Kelly and Young, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (victim under thirteen years of age), in lower court case 93-128453; second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii); MSA 28.788(3)(1)(b)(ii) (relation to victim), in lower court case 93-128452; and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), in lower court case 93-128454. Defendant also pleaded no contest to assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, in lower court case 94-131755. The trial court sentenced defendant to twenty to forty years' imprisonment for the first-degree CSC convictions, to five to fifteen years' imprisonment for the second-degree CSC conviction, to five to ten years' imprisonment for the assault with intent to commit penetration conviction, and to three to ten years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction. He appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair and impartial trial because the prosecutor engaged in numerous instances of misconduct. We disagree. Defendant neglected to object to each

instance of alleged misconduct. Therefore, he failed to properly preserve this issue. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). Review is foreclosed unless the prejudicial effect of the prosecutor's remarks was so great that it could not have been cured by an appropriate instruction. *Id.* Having reviewed each instance of alleged prosecutorial misconduct, we conclude that the contested remarks were either permissible or that the prejudicial effect of the prosecutor's comments was so minimal that it could have been cured by appropriate instructions to the jury. Therefore, we decline to further address this unpreserved issue.

## II

Next, defendant advances that his right against self-incrimination and his right to due process of law, US Const, Ams V, XIV; Const 1963, Art 1, § 17, were violated when the prosecutor elicited testimony from a police officer that defendant instructed him to "talk to my attorney" and then refused to speak with him when the officer attempted to interview defendant at his place of employment. We disagree.

Defendant failed to raise this issue in the trial court. Therefore, it is unpreserved. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Nevertheless, we may address this issue for the first time on appeal, because it presents an important constitutional question. *People v Johnson*, 215 Mich App 658, 669; 547 NW2d 65 (1996). Issues of constitutional law are reviewed de novo. See *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

A defendant's privilege against self-incrimination and his right to due process of law restrict the use of his silence in a criminal trial. *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276, reh den 437 Mich 1208; 466 NW2d 281 (1990). However, constitutional protections only apply if the defendant exercised his right to silence when his testimony could have been compelled and then asserted his privilege against self-incrimination; that is, the privilege only applies when a defendant was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way and when the silence was in reliance on the *Miranda*<sup>1</sup> warnings. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 750 (1992). Where a defendant's silence or nonresponsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings, it is not constitutionally protected and may properly be admitted as substantive evidence. *Id.* at 166-167.

Here, defendant's "silence" was not constitutionally protected. Oxford Police Sergeant Ronald Crichton testified that when he met defendant at his place of business, he was merely conducting a routine interview of defendant as part of his investigation of the victim's allegations. Crichton did not curtail defendant's freedom in any way during their encounter. In fact, when Crichton informed defendant that he wished to speak with him in the office of defendant's supervisor, defendant refused and then walked back to his personal work area. Crichton did not recite the *Miranda* warnings to defendant because he had no intention of arresting defendant. Because the exchange between defendant and Crichton does not implicate defendant's constitutional protections, defendant's refusal to speak with Crichton was admissible at trial.

### III

Next, defendant argues that the trial court abused its discretion by admitting over defense counsel's objections the testimony of two prosecution witnesses regarding statements that the complainant made to them about her sexual abuse. Although we agree that the trial court's admission of this testimony as excited utterances pursuant to MRE 803(2) was erroneous, we find that the error was not prejudicial to defendant and, accordingly, refuse to reverse defendant's convictions.

This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

Hearsay is defined as "a statement, other than 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); *People v Hyland*, 212 Mich App 701, 707-708; 538 NW2d 465 (1995). Hearsay is not admissible at trial except as provided in the Rules of Evidence. MRE 802; *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). The excited utterance exception exempts from the blanket ban of the hearsay rule "[statements] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2); *People v Hackney*, 183 Mich App 516, 521; 455 NW2d 358 (1990). In order to be properly admitted pursuant to the excited utterance exception, a hearsay statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion. *Id.* at 522. In sexual abuse cases, the third prong of the excited utterance test is most problematic, because child victims often relate the account of their abuse after a sufficient period of time has passed to allow for reflective thought. *Id.* at 522-523. As the Supreme Court has stated, "The focus of MRE 803(2), given a startling event, is whether the declarant spoke while still under the stress caused by the startling event. . . . [T]he justification for [MRE 803(2)] is lack of capacity to fabricate rather than the lack of time to fabricate." *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988).

Here, the witnesses variously testified that the victim told them she was afraid of defendant coming into her bedroom at night and that defendant had once attempted to engage in digital intercourse with her. However, the prosecution failed to establish as to each witness that the victim spoke to them while she was still "under the stress of excitement caused by the event." MRE 803(2); *id.* at 522-524. There was simply no indication from the testimony that the victim spoke with the witnesses before she had the capacity to contrive or misrepresent. Therefore, the witnesses' testimony was not admissible pursuant to MRE 803(2). *Id.* However, we find that the statements were admissible under MRE 801(d)(1)(B) to rebut defendant's assertion that the victim's allegations of sexual abuse were contrived in retaliation for her parents' divorce. The trial court therefore did not abuse its discretion in admitting the statements. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Even if the trial court erred in admitting the challenged evidence, reversal is not warranted where the error is harmless. *Ullah, supra* at 676; see also MCL 769.26; MSA 28.1096; MCR 2.613(A). An error in admitting challenged evidence is harmless unless the error was prejudicial to the defendant, the determination of which focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). It need not be harmless beyond a reasonable doubt. *Id.* at 216.

The witnesses' testimony concerned the victim's statements about defendant's sexual abuse. This testimony merely reiterated the victim's graphic, credible testimony about defendant's criminal acts. Since the challenged testimony was merely cumulative, any error in its admission did not prejudice defendant. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Therefore, reversal of defendant's convictions is not warranted.

Defendant further contends that the trial court abused its discretion by admitting the testimony of Terrance James Paczas regarding a conversation he had with one of the above witnesses, during which she told him that defendant had attempted to sexually molest the victim. Defendant failed to object to Paczas' testimony. Therefore, this issue is not preserved for review by this Court. MRE 103(a)(1); *People v Miller (After Remand)*, 211 Mich App 30, 42; 535 NW2d 518 (1995). We may still review this issue if failure to do so would result in manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). However, the admission of Paczas' testimony was not prejudicial to defendant because it merely reiterated the victim's prior testimony. *Rodriguez, supra*. Accordingly, our refusal to review this issue will not result in manifest injustice.

#### IV

Next, defendant contends that several of the prosecutor's witnesses impermissibly vouched for the victim's credibility by testifying that her testimony was truthful and accurate. Defendant failed to object to their testimony on this basis, thus neglecting to raise this argument before the trial court. An issue not raised before the trial court is not properly preserved for appellate review. *Connor, supra* at 422. We are not obliged to address unpreserved issues on appeal. *Stanaway, supra*. Nevertheless, we have reviewed the relevant portions of the trial transcript and find no merit to defendant's assertion that witnesses advanced an opinion that the victim was truthful, nor did the witnesses aver that defendant actually molested the complainant.

#### V

Next, we disagree with defendant's contention that he received ineffective assistance of counsel. Because defendant failed to motion the trial court for a new trial or for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this issue is unpreserved for review, unless the alleged deficiencies in defense counsel's performance are apparent from the lower court record. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). To establish whether a defendant's right to effective assistance of counsel has been so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below

an objective standard of reasonableness and that the representation was so prejudicial as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687.

Defendant first contends that his representation at trial was ineffective because his attorney failed to object on hearsay grounds to the testimony of two prosecution witnesses regarding statements that the victim made to them about her sexual abuse. We have already determined that defendant was not prejudiced by this testimony, as it was merely cumulative to the victim's testimony. Defendant may not predicate his claim of ineffective assistance of counsel on his attorney's failure to advance an objection that would not have affected his chances of acquittal. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Additionally, defendant claims that his attorney's representation was ineffective because he failed to advance a hearsay objection when James Paczas testified that one of the above witnesses told him that the victim stated that defendant tried to sexually molest her. Again, we have determined that defendant was not prejudiced by Paczas' testimony, because it was merely cumulative. *Id.*

Next, defendant claims that his attorney failed to effectively represent him because he did not object to several witnesses' opinion testimony that the victim's allegations against him were truthful and accurate. There is no indication from the record that any witness advanced such an opinion. Defendant's attorney was therefore not required to advance an objection on the basis of "improper vouching," because such a course would have been futile. *Id.*

Defendant further argues that his attorney should have advanced timely objections to instances of alleged prosecutorial misconduct. Previously, we determined that each instance of alleged prosecutorial misconduct was relatively innocuous. Objections to the prosecutor's limited questionable comments would have only highlighted them for the jury, and might have increased their prejudicial impact. Therefore, defense counsel's failure to object may be viewed as a matter of sound trial strategy. See *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987); *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). We will not second-guess defense counsel's strategic decisions, even if they were not successful. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 485 (1996).

Defendant also argues that his attorney failed to effectively assist him at trial because he elicited testimony from the victim that defendant had been incarcerated prior to trial. In his closing argument, defense counsel used this testimony to support the theory that the victim's accusations against defendant were untrue and part of her mother's plan to retaliate against him for filing divorce papers against her. Defense counsel argued that defendant was in jail because the victim's mother concocted the allegations of sexual abuse, not because defendant had committed a crime. It is conceivable that a juror might have accepted this defense theory and voted for acquittal. It appears that defense counsel elicited this as a matter of sound trial strategy, which we will not second-guess. *Id.*

Additionally, defendant argues that he received ineffective assistance of counsel because his attorney elicited testimony from the victim that defendant sexually molested her “hundreds” of times and once attempted to take a shower with her. When viewed in light of the closing argument, it is clear that defense counsel sought this testimony to support the argument that it was highly unlikely defendant could have kept hundreds of flagrant episodes of sexual abuse hidden from the rest of his family for more than ten years. Again, elicitation of this testimony appears to be part of defense counsel’s sound trial strategy of raising questions concerning the credibility of the victim and her mother, the merits of which we will not question. *Id.*

Finally, defendant argues that he received ineffective assistance of counsel because his attorney elicited testimony that defendant physically abused the victim, her mother, and his other children. Such questions were obviously intended to raise questions concerning the credibility of the victim and her mother. Defense counsel pointed out to the jury that the police were not apprised of defendant’s physical abusiveness until much later after the victim and her mother claimed to have been abused. Defense counsel questioned why this was so, and argued that the victim and her mother invented the allegations of physical abuse to keep defendant incarcerated after he had been released from his imprisonment for the sexual misconduct charges. Defense counsel also argued that their failure to timely report defendant’s physical abusiveness cast doubt upon the veracity of their allegations. Had a jury member accepted defense counsel’s argument, he or she may have voted for acquittal. Because this is a matter of sound trial strategy, we refuse to second-guess it, and thus hold that defendant was not denied effective assistance of counsel.

## VI

Next, defendant argues that the cumulative prejudicial effect of the errors committed at trial requires reversal of his convictions. We disagree.

The only cognizable instances of trial error involve instances of questionable prosecutorial conduct and that stemming from the erroneous admission of hearsay evidence. In the context of defendant’s three-day trial, instances of prosecutorial misconduct were isolated, and each allegedly prejudicial comment had little tendency to mislead the jury or prejudice the defendant. Additionally, they do not seem to have been deliberately injected into the proceedings. As for the hearsay issue, we have determined that the statements were admissible under MRE 801(d)(1)(B) to rebut defendant’s assertion that the victim’s allegations of sexual abuse were contrived in retaliation for her parent’s divorce. While defendant may not have received a perfect trial, he received a fair one. *People v Bahoda*, 448 Mich 261, 292-293 n 64; 531 NW2d 659, reh den 448 Mich 1225; 534 NW2d 520 (1995). The cumulative effect of the few trial errors does not require reversal.

## VII

Finally, defendant argues that the trial court abused its discretion by sentencing him to twenty to forty years’ imprisonment, which represented an upward departure from his recommended minimum sentence as provided by the sentencing guidelines. We do not agree.

A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Where a sentence is not proportionate, the sentencing court has abused its discretion; appellate review of sentencing decisions by the trial court is limited to determining whether such an abuse of discretion has occurred. *Id.*

The sentencing guidelines are intended to assist the trial court in assessing the appropriate sentence and promote statewide consistency in sentencing. *People v Stone*, 195 Mich App 600, 608; 491 NW2d 628 (1992). Departures from guidelines are permitted, but are suspect and subject to careful scrutiny on appeal. *Id.*; *Milbourn, supra* at 656-657. Departures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. *Id.* at 657. When a sentencing court departs from the guidelines, it must articulate its reasons for departure on both the record at sentencing and on the sentencing information report (SIR). MCR 6.425(D)(1); *People v Barclay*, 208 Mich App 670, 677; 528 NW2d 842 (1995).

Defendant's recommended minimum sentences of incarceration for his two counts of first-degree CSC under the guidelines were eight to ten years. At sentencing, the trial court stated that the guidelines did not sufficiently take incest into account. Specifically, the court stated that the guidelines did not address this crime's effect on the child victim and her entire family. Furthermore, on defendant's SIR, the trial court stated, "This Court feels the crime to be heinous. Guidelines do not address incest specifically. Defendant raped his daughter from the time she was 3 years old until age 17 – hundreds of times."

We hold that the trial court articulated sufficient factors at sentencing and on defendant's SIR to justify its substantial upward departure from the guidelines in fashioning defendant's sentence. Contrary to defendant's argument that the guidelines adequately accounted for his relationship to the victim, the guidelines do not adequately account for the relationship between the victim and the perpetrator, which can either be a mitigating or an aggravating circumstance. *Milbourn, supra* at 660-661. Moreover, the trial court also departed from defendant's recommended minimum sentence because the victim alleged that defendant sexually molested her hundreds of times. The sentencing court is permitted to consider the facts underlying uncharged offenses in reaching its sentencing decision. *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994). In sum, we find that defendant's sentence is proportionate to defendant and the underlying circumstances of his particularly abhorrent crime. Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ Martin M. Doctoroff  
/s/ Michael J. Kelly  
/s/ Robert P. Young, Jr.

---

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).