

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 17, 2015

v

GEOFFREY TOWNSEND,  
Defendant-Appellant.

No. 319604  
Oakland Circuit Court  
LC No. 2013-245984-FH

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Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Defendant, Geoffrey Townsend, appeals as of right his jury trial convictions of six counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration; victim is at least 13 but under 16). Defendant was a Detroit Police Officer who was involved with a program called “Reality Check” that helped struggling children. Through his involvement in this organization, he met RW and CL, whom he sexually assaulted on various occasions. Defendant was sentenced to concurrent terms of 10 to 15 years for each conviction. We affirm.

I. ADMISSION OF EVIDENCE

A. STANDARD OF REVIEW

Defendant first contends that the trial court erred in admitting the prior consistent written statements of RW, CL, and of an “other-acts” witness, in violation of MRE 801(d)(1)(B). “This Court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion.” *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). “An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). When the decision involves a preliminary question of law, such as the interpretation of the Michigan Rules of Evidence, our review is *de novo*. *Dobek*, 274 Mich App at 93. Ultimately, “[a]n error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party.” *Id.*

B. ANALYSIS

In order for a prior consistent statement to be admitted under MRE 801(d)(1)(B), the following test must be satisfied: (1) the declarant testifies at trial and is subject to cross-

examination; (2) there is an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the prior statement is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement was made at a time prior to the time the supposed motive to falsify arose. *People v Mahone*, 294 Mich App 208, 213; 816 NW2d 436 (2011).

Defendant contends that the victims' prior written statements did not satisfy this test. However, even if improperly admitted, reversal is not warranted because any error was harmless beyond a reasonable doubt. MCR 2.613. "Because the [victims] testified about the alleged sexual abuse at trial," their prior consistent statements "only reiterated the [victims'] testimony that [they] had been abused." *People v Rodriguez*, 216 Mich App 329, 332; 549 NW2d 359 (1996). In other words, because evidence of their prior consistent statements "was mere cumulative evidence, we hold that the admission of this testimony did not prejudice defendant." *Id.* See also *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) ("[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." (Quotation marks and citation omitted)).

Accordingly, even if the prior consistent statements do not meet the test for admission under MRE 801(d)(1)(B), defendant is not entitled to a new trial.

## II. GREAT WEIGHT OF THE EVIDENCE

### A. STANDARD OF REVIEW

Defendant next contends that the verdict was against the great weight of the evidence. Generally, "[w]e review for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).<sup>1</sup> "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 469. Conflicting testimony, even if impeached to some extent, is not a sufficient ground for a new trial, and credibility questions are within the province of the jury. *Id.* at 469-470.

### B. ANALYSIS

"[A] person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and that person is at least thirteen but younger than sixteen years old." *People v Starks*, 473 Mich 227, 235; 701 NW2d 136 (2005); MCL 750.520d(1)(a). In the instant case, it is undisputed that both RW and CL were between the ages of 13 and 15 at the time of the alleged sexual assaults. They both testified that defendant

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<sup>1</sup> To the extent that this issue may not be preserved because defendant raised it in his motion for judgment notwithstanding the verdict, not in his motion for a new trial, we note that defendant would not prevail under a plain error standard either.

engaged in sexual intercourse with them, namely, inserting his penis into their vaginas. RW also testified that he inserted his penis into her mouth. CL testified that he inserted his finger inside her vagina.

MCL 750.520h provides, “The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.” Thus, the testimony of RW and CL was sufficient to convict defendant of the charges. Their testimony was corroborated, in part, by the diagrams they drew that accurately depicted defendant’s bedroom. Furthermore, three other-acts witnesses testified that they also had sexual contact with defendant when they were between the ages of 13 and 15.

Defendant raises several credibility arguments in an attempt to undermine the victims’ accounts of his crimes. However, credibility determinations are exclusively within the purview of the jury. *Lacalamita*, 286 Mich App at 469-470. Also, the fact that the witnesses’ testimony may have been impeached to some extent is not a sufficient ground to warrant a new trial. *Id.* Here, the jury reasonably concluded that the victims were providing credible testimony. We will not second-guess that determination on appeal.

### III. NEWLY DISCOVERED EVIDENCE

#### A. STANDARD OF REVIEW

Defendant also argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. We review the denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). “An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions.” *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). However, “[a] mere difference in judicial opinion does not establish an abuse of discretion.” *Cress*, 468 Mich at 691. Furthermore, we review a trial court’s factual findings for clear error. *Id.*

Alternatively, defendant contends that he is entitled to a new trial for ineffective assistance of counsel because defense counsel failed to produce this evidence at trial. “Because no *Ginther* hearing was held, *People v Ginther*, 390 Mich 436, 442-443, 212 NW2d 922 (1973), review is limited to errors apparent on the record.” *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).<sup>2</sup>

#### B. ANALYSIS

“Historically, Michigan courts have been reluctant to grant new trials on the basis of newly discovered evidence.” *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). See

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<sup>2</sup> In his motion for a new trial, defendant included one statement asserting that a new trial was appropriate because of ineffective assistance of counsel. He provided no further argument, nor did he request a new trial or a *Ginther* hearing based on ineffective assistance of counsel. Thus, we find that defendant has not preserved this issue.

also *Rao*, 491 Mich at 279-280 (“motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor.”). Parties are encouraged “to use care, diligence, and vigilance in securing and presenting evidence.” *Grissom*, 492 Mich at 312 (quotation marks and citation omitted). “[I]n fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent unusual circumstances, the trial will be the one and only opportunity to present their case.” *Rao*, 491 Mich at 280.

In order to demonstrate that a new trial is warranted based on newly discovered evidence, a defendant must show the following:

- (1) the evidence itself, not merely its materiality, was newly discovered;
- (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*Grissom*, 492 Mich at 313 (quotation marks and citation omitted).]

While impeachment evidence may constitute newly discovered evidence, our Supreme Court has warned that “newly discovered impeachment evidence ordinarily will not justify the grant of a new trial.” *Id.* at 317-318. The Court has cautioned that “[i]t will be the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness’s testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial.” *Id.* at 318.

In the instant case, defendant relies on impeachment evidence in the form of statements from Tamika Duncan and Melvin Kemp, and evidence implicating the credibility of one of the other-acts witnesses (including the lack of DNA evidence that defendant assaulted her). Defendant conclusively states that this evidence is newly discovered. However, he provided neither elaboration of nor support for that bald assertion. In contrast, the prosecution provides a detailed explanation of how this evidence was provided to defendant in pretrial discovery. In light of defendant’s silence on this matter, we cannot say that he has demonstrated this evidence was, in fact, newly discovered. *Grissom*, 492 Mich at 313.

Defendant conclusively contends that, with the use of reasonable diligence, he could not have discovered or produced this evidence at trial. Yet, defendant again has not demonstrated the truth of that assertion. In fact, he provides no explanation for why he did not produce this evidence at trial. Thus, defendant has failed to satisfy the first and third prongs of the newly discovered evidence test. *Grissom*, 492 Mich at 318.

Defendant also has failed to demonstrate that an exculpatory connection exists between the witnesses’ testimony and the new impeachment evidence, or that a different result is probable on retrial. *Grissom*, 492 Mich at 318. At best, this “newly discovered” evidence amounts to relatively minor impeachment evidence. Specifically, Tamika Duncan’s proposed testimony is an attempt to impeach RW and her mother about a phone conversation, and imply that RW was kicked out of a program. Yet, Duncan’s statements do not amount to the “necessary exculpatory connection” that goes to the heart of RW’s testimony, as she did not proffer any knowledge regarding the sexual assaults. See *Grissom*, 492 Mich at 318. Next, Melvin Kemp’s proposed

testimony is an attempt to impeach CL's testimony about going into defendant's home on the day of the assault. However, CL did not recall the specific date the incident occurred, so there is no way to establish that Kemp was the same person raking leaves that day. In regard to the remaining evidence, it goes toward impeaching the other-acts witness, not RW or CL.

Thus, even if we were to assume that this evidence was "newly discovered," it does not amount to "the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial." *Grissom*, 492 Mich at 318. Contrary to the cases defendant cites on appeal, he has offered no evidence of a recanting witness, see *People v Canter*, 197 Mich App 550, 560-562; 496 NW2d 336 (1992), and it is defendant's burden to prove all elements of the newly discovered evidence test, *Rao*, 491 Mich at 279.

We likewise reject defendant's ineffective assistance of counsel claim. Even if we were to agree that the performance of defense counsel fell below an objective standard of reasonableness, a different result is not reasonably probable on remand. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). This "newly discovered" evidence, at most, amounts to relatively minor impeachment evidence. In contrast, the evidence at trial of defendant's guilt was overwhelming. The two victims, as well as the three other-acts witnesses, were between the ages of 13 and 15, were in "Reality Check," and testified that defendant sexually assaulted them on several occasions. Further, it is not as if defense counsel failed to impeach these witnesses. In fact, defense counsel conducted searching cross-examinations, continually attempting to highlight the lack of the victims' credibility.

In light of the overwhelming evidence of defendant's guilt, we cannot say that the evidence he highlights on appeal would have any effect on the outcome of the proceedings. Defendant has not demonstrated that he was denied the effective assistance of counsel. *Carbin*, 463 Mich at 600. In light of our analysis, we do not find that a remand for a *Ginther* hearing warranted.

#### IV. SENTENCING

##### A. STANDARD OF REVIEW

Lastly, defendant challenges the trial court's scoring of Offense Variables (OVs) 8 and 13, and the trial court's sentencing departure.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). "Whether the facts, as found, are adequate to satisfy the

scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Hardy*, 494 Mich at 438.<sup>3</sup>

We review the reasons for a sentencing departure for clear error, but we review *de novo* the trial court’s conclusion that a reason is objective and verifiable. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). “Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Id.*

#### B. OV 8

A score of 15 points is warranted for OV 8 if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). “[T]here is no requirement that the movement itself be forcible.” *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Both victims testified that defendant transported them in his car to his house, where the sexual assaults occurred. The victims were alone with defendant in the car and house. Thus, defendant asported them to a place or situation of greater danger because by bringing them to his home, he isolated them and increased the likelihood of the sexual assaults occurring. Based on these circumstances, it cannot be said that the trial court erred by assessing 15 points to OV 8. See *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009) (upholding a score of 15 points when defendant took the victim to more isolated locations, which were “places or situations of greater danger because they are places where others were less likely to see defendant committing crimes.”); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002) (a score of 15 points is appropriate when “the victim was taken in a car with only defendant present to what was described as . . . an isolated area[.]”); *Spanke*, 254 Mich App at 648 (“The victims were moved, even if voluntarily, to defendant’s home where the criminal acts occurred. The victims were without doubt asported to [a place of] greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others.”).

#### C. OV 13

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<sup>3</sup> As the prosecution contends, the record could support a finding that defendant waived any objection to OV 8 and 13 because he agreed with the trial court’s overall calculation of the guidelines. However, at sentencing the parties referenced a sentencing memorandum that is not included in the lower court record. In light of the lack of clarity regarding this issue, we will address defendant’s challenges. Further, defendant filed a motion for resentencing based on the erroneous scoring of OV 8 and 13. See *People v Moore*, 480 Mich 1152, 1153; 746 NW2d 300 (2008) (this issue is preserved if it is raised “at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals.”).

Next, OV 13 pertains to a continuing pattern of criminal behavior. A score of 25 points is warranted if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). Furthermore, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Third-degree criminal sexual conduct is considered a crime against a person. MCL 777.16y.

Here, RW testified that defendant had sex with her between 30 and 50 times within a five-year period. In addition, the jury convicted defendant of four counts of third-degree criminal sexual conduct in regard to RW within a five-year period. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001) (25 points is appropriate when the defendant had four concurrent convictions). Accordingly, the trial court properly scored OV 13 at 25 points.

#### D. SENTENCING DEPARTURE

Lastly, defendant challenges the trial court’s decision to depart from the sentencing guidelines. A trial court may depart from that range if substantial and compelling reasons exist, and the trial court divulges those reasons on the record. *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012). In order to be substantial and compelling, the reasons relied on must be objective and verifiable, which means “based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *Id.* (quotation marks and citation omitted). The reasons for departure also must “be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court’s attention.” *Id.* (quotation marks and citation omitted). “A trial court’s reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record.” *Id.* at 185.

On appeal, defendant offers a conclusory assertion that the trial court failed to articulate substantial and compelling reasons for departure, which were not already accounted for in the sentencing guidelines. Defendant provides no further explanation nor analysis that is specific to the trial court’s ruling in this case. “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 Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted).

Moreover, the trial court articulated appropriate reasons for its departure. It relied on the fact that defendant was a police officer who had cultivated a reputation in the community for being trustworthy through his involvement in “Reality Check.” He then used his position of authority to exploit the victims. He also abused the trust their parents placed in him. The trial court also noted that an upward departure was justified because of the number of other unaccounted for sexual acts that defendant committed.

Each of these factors is objective and verifiable because evidence in the record substantiates their existence. *Anderson*, 298 Mich App at 185. Nor has defendant provided any argument regarding how these factors were accounted for in the sentencing guidelines. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). Furthermore, these factors keenly and irresistibly grab a court’s attention. *Anderson*, 298 Mich App at 183. In light of the additional

30 to 50 incidents of sexual assault, the record establishes that the sentence was proportionate to the evidence and crime committed.

Because we find that the trial court's reasons for departing were based on substantial and compelling reasons that are objective and verifiable, we find no error requiring resentencing.

#### V. CONCLUSION

Defendant is not entitled to relief based on any evidentiary error, the great weight of the evidence, newly discovered evidence, ineffective assistance of counsel, or sentencing error. Defendant is not entitled to a new trial, a hearing, or resentencing. We affirm.

/s/ Pat M. Donofrio  
/s/ Michael J. Riordan  
/s/ Michael F. Gadola