

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 12, 2013

v

REBECCA HERNANDEZ,

Defendant-Appellant.

No. 309431
Ingham Circuit Court
LC No. 10-001190-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

CRISTOVAL HERNANDEZ,

Defendant-Appellant.

No. 309710
Ingham Circuit Court
LC No. 10-001189-FC

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 309431 defendant Rebecca Hernandez appeals as of right her jury-trial convictions of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(ii) (sexual penetration with a person who is at least 13 but less than 16 years of age and related to defendant) and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(ii) (sexual contact with a person who is at least 13 but less than 16 years of age and related to defendant). The trial court sentenced Rebecca to concurrent sentences of 18 to 50 years' imprisonment for the CSC I convictions and to 5 years and 11 months to 15 years' imprisonment for the CSC II conviction. Because the evidence was sufficient to support Rebecca's convictions and she is not entitled to resentencing, we affirm her convictions and sentences. Because Rebecca's judgment of sentence erroneously indicates that she was convicted of seven, rather than six, counts of CSC I, however, we remand for correction of her judgment of sentence in that limited respect.

In Docket No. 309710 defendant Cristoval Hernandez appeals as of right his jury-trial convictions of nine counts of CSC I, MCL 750.520b(1)(b)(i) (sexual penetration with a person who is at least 13 but less than 16 years of age and defendant is a member of same household), one count of CSC II, MCL 750.520c(1)(b)(i) (sexual contact with a person who is at least 13 but less than 16 years of age and defendant is a member of same household), one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(d) (sexual penetration with a person who is related to defendant), and one count of disseminating sexually explicit matter to a minor, MCL 722.675. The trial court sentenced Cristoval to concurrent sentences of 22-½ to 50 years' imprisonment for the CSC I convictions, 5 years and 11 months to 8 years and 4 months' imprisonment for the CSC II conviction, 7 years and 1 month to 15 years' imprisonment for the CSC III conviction, and to 1 year and 4 months to 2 years' imprisonment for the disseminating sexually explicit matter to a minor conviction. Because the trial court's limitations on cross-examination did not deny Cristoval his right of confrontation, the prosecutor's leading questions asked of a child witness did not deny Cristoval his rights to a fair trial and to confront that witness, the admission of expert testimony regarding "grooming" did not deny Cristoval his right to a fair trial, the trial court did not err by admitting evidence involving uncharged sexual acts and physical abuse of the victim and pornographic movies recovered from Cristoval's home, and Cristoval is not entitled to resentencing, we affirm.

I. FACTUAL BACKGROUND

Defendants' convictions stem from their repeated sexual assaults of "AV," Rebecca's biological daughter and Cristoval's stepdaughter. The inappropriate activity began when AV was either 13 or 14 years old. She recalled sitting in the front seat of a van with Cristoval when he instructed her how to masturbate. Cristoval claimed that Rebecca had told him that she had seen AV staring at Cristoval's "private areas." When Cristoval and AV returned back home, Rebecca asked AV whether Cristoval had talked to her. Also when AV was 13 or 14 years old, Cristoval showed AV a pornographic video in Cristoval and Rebecca's bedroom while Rebecca was downstairs doing laundry. He told AV that he and Rebecca wanted her to watch the video. Afterward, when AV asked Rebecca about the video, Rebecca told her that that was how some people earned money and what some people watched for entertainment. Shortly thereafter, on the same day, Rebecca told AV to go upstairs with her. AV followed Rebecca back into the bedroom, and Cristoval and Rebecca told AV to shut and lock the door. Cristoval turned the pornographic video on again and put his hand inside the front of Rebecca's pants. AV saw the movement of Cristoval's hand inside Rebecca's pants and Rebecca closed her eyes and started moaning. Cristoval then told AV to start "fingering" Rebecca and grabbed her hand. He placed AV's hand on Rebecca's vaginal area outside her clothes and moved it around. Rebecca reacted in the same manner that she had when Cristoval was touching her.

Thereafter, Cristoval engaged in digital-anal penetration with AV when she was cleaning one of the bedrooms in the home. AV testified that it hurt, she was crying, and that Cristoval told her that he was "opening [her] up." He also told her that it was okay because he was not her father. AV maintained that Cristoval engaged in digital-anal penetration with her at least ten times. He also engaged in oral-penile penetration with her several times, beginning before she turned 15 years old. At first, Rebecca engaged in oral-penile penetration with Cristoval while AV watched, then Cristoval told AV to do the same thing along with Rebecca. While Rebecca and AV were both fellating Cristoval, Cristoval moved their heads together and Rebecca began

kissing AV. Cristoval directed AV to kiss Rebecca back. AV testified that Rebecca never objected to any of the sexual activities involving AV or indicate that she did not want to participate.

AV recalled another incident that occurred when she was 14 years old after Rebecca had come home from the bar drunk. Cristoval performed oral sex on Rebecca and then instructed AV to do the same thing. When AV did so, Rebecca appeared to enjoy it and watched AV before she closed her eyes. Cristoval instructed AV to perform oral sex on Rebecca on another occasion while he was engaging in anal-penile penetration with AV. AV was certain that she was 14 years old at that time because she was planning her quinceañera, a party for girls in the Hispanic culture who were turning 15 years old, were still virgins, and had done all of their sacraments. While Cristoval was penetrating AV anally, he “slipped” and penetrated her vagina with his penis. Cristoval then remarked that AV would not be getting a quinceañera because she was no longer a virgin. On a previous occasion, the first time that Cristoval engaged in anal-penile penetration with AV, he held her hands behind her back while she was crying and asking him to stop. Cristoval told her to be quiet or he would do the same thing to her younger sister, “CS.” Cristoval engaged in anal-penile penetration with AV on numerous occasions. He also directed AV more than once to put her fingers inside Rebecca’s vagina. Rebecca did not object to the activity.

According to AV, over time, Cristoval stopped making her engage in sexual activities with Rebecca and Rebecca was no longer present during AV’s sexual activities with Cristoval unless Rebecca had “supposedly” fallen asleep on the bed next to AV and Cristoval. On some occasions, Cristoval forced AV to lick Rebecca’s breasts or engage in oral sex with her while Rebecca was purportedly asleep. AV described two occasions in which she engaged in sexual activity with Rebecca when Cristoval was not present. On one occasion, Rebecca told AV to insert a dildo into AV’s vagina. AV recalled that the dildo was red with a black “knob thing” at the end. Rebecca then sent a text message to Cristoval stating, “I have her over here playing with herself.” On another occasion, Rebecca told AV that an orgasm would help relieve Rebecca’s menstrual cramps. Rebecca forced AV to “make out” with her, suck on her bare breast, and rub her vaginal area outside her clothes. Rebecca told AV that it was a shame that Cristoval did not touch Rebecca anymore and that Rebecca had to have AV “do this.” AV also testified that Rebecca performed oral sex on AV and licked her breasts.

AV maintained that, routinely, Cristoval forced her to perform oral sex on him while he engaged in digital-vaginal penetration with her. Thereafter, he would engage in penile-vaginal penetration with her. He sometimes also performed oral sex on her. The last incident that occurred involved Cristoval asking AV to perform oral sex on him in the basement of their home when she was 17 years old. AV testified that while she initially tried to fight against Cristoval and Rebecca’s sexual encounters, she eventually went “along with it” because they would beat her if she refused. Cristoval also claimed that he would do the same thing to CS, AV’s younger sister. AV wanted to ensure that neither Cristoval nor Rebecca sexually assaulted CS. AV also did not think that anyone would believe her if she disclosed the abuse.

Eventually, AV told her boyfriend, Juan Zavala, about the sexual abuse. Zavala testified that when he and AV engaged in sexual intercourse, AV sometimes stopped him and held on to him with her eyes really wide open. AV also kicked him, pushed him off of her, and said

Cristoval's name on one occasion. AV ultimately told her grandmother about the abuse and reported it to the police. The police recovered more than 50 pornographic DVDs and VHS tapes from Cristoval and Rebecca's house. They also recovered three dildos, including a red one with a "black round thing at the top." The jury convicted both Rebecca and Cristoval on all charges.

II. DOCKET NO. 309431—REBECCA

A. SUFFICIENCY OF THE EVIDENCE

Rebecca first argues that the evidence was insufficient to support her convictions beyond a reasonable doubt. We review de novo a challenge to the sufficiency of the evidence. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). We must "examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Questions involving witness credibility and the weight to be accorded to evidence are to be resolved by the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Initially, we note that Rebecca's judgment of sentence erroneously reflects that she was convicted of seven, rather than six, counts of CSC I. Rebecca was initially charged with five counts of CSC I. Two additional counts of CSC I and one count of CSC II were added at her preliminary examination, and one count of CSC I (count 4) was dismissed at that time. Thus, she was bound over on six counts of CSC I and one count of CSC II, and the jury convicted her on all counts. Despite that count 4 was dismissed at Rebecca's preliminary examination, the trial court sentenced her on that count and it is listed on her judgment of sentence. We therefore remand Rebecca's case to the trial court for the court to correct this error on Rebecca's judgment of sentence.

Rebecca contends that the evidence presented to the jury, even if believed, was insufficient to support her convictions of CSC I and CSC II. In order to establish CSC I pursuant to MCL 750.520b(1)(b)(ii), the prosecution must prove that: (1) the defendant engaged in sexual penetration with another person, (2) the other person was at least 13 but less than 16 years of age, and (3) the defendant is related to the victim by blood or affinity to the fourth degree. "'Sexual penetration' means 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." MCL 750.520a(r). To establish CSC II pursuant to MCL 750.520c(1)(b)(ii), the prosecution must show that: (1) the defendant engaged in sexual contact with another person, (2) the other person was at least 13 but less than 16 years of age, and (3) the defendant is related to the victim by blood or affinity to the fourth degree. "'Sexual contact' includes the 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" MCL 750.520a(q). The victim's testimony need not be corroborated in order to convict a defendant under MCL 750.520b(1)(b)(ii) or MCL 750.520c(1)(b)(ii). MCL 750.520h. Further, to prove a conviction under an aiding and abetting theory,

the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) (citation omitted).]

In this case, AV's age and relation to Rebecca were not disputed. The only contested issue was whether Rebecca engaged in sexual penetration and sexual contact with AV. As previously discussed, the record shows that Rebecca engaged in numerous instances of CSC I and CSC II with AV, either directly or as an aider and abettor. The jury verdict form shows that the jury convicted Rebecca of two counts of CSC I involving digital-vaginal penetration (counts 1 and 6). The record supports those convictions. AV testified that Cristoval instructed her on more than one occasion to put her fingers inside Rebecca's vagina and that she did so. She maintained that Rebecca did not object to the activity. The jury verdict form also indicates that the jury convicted Rebecca of two counts of CSC I involving oral-vaginal penetration (counts 2 and 3). The record supports those convictions as well. AV testified that she performed oral sex on Rebecca when Rebecca was drunk after coming home from the bar. On that occasion, Cristoval performed oral sex on Rebecca first and then instructed AV to do the same thing. AV also testified that she performed oral sex on Rebecca while Cristoval was engaging in anal-penile penetration with AV. AV recalled that incident in particular because she was planning her quinceañera when that incident occurred. That incident also supported Rebecca's conviction, as an aider and abettor, of CSC I involving anal-penile penetration (count 5).

The final CSC I conviction of which the jury convicted Rebecca involved vaginal penetration with a dildo (count 8). The record supports that conviction. AV testified that on one occasion when Cristoval was not present, Rebecca told AV to insert a dildo into AV's vagina and then Rebecca sent Cristoval a text message stating, "I have her over here playing with herself." Finally, the record supports Rebecca's conviction of CSC II (count 7), involving sexual contact. AV testified that after Cristoval showed her a pornographic video, he directed AV to "finger" Rebecca and placed AV's hand on Rebecca's vaginal area outside her clothes. Cristoval moved AV's hand around, and Rebecca closed her eyes and started moaning. AV also testified that she sucked Rebecca's breast and rubbed Rebecca's vaginal area outside her clothes in an effort to relieve Rebecca's menstrual cramps. Thus, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved the essential elements of Rebecca's CSC I and CSC II convictions beyond a reasonable doubt. See *Ericksen*, 288 Mich App at 196.

B. SENTENCING—UPWARD DEPARTURE

Rebecca next argues that the trial court abused its discretion by upwardly departing from the sentencing guidelines with respect to her CSC I convictions. Rebecca's sentencing guidelines range was 81 to 135 months, or 6 years and 9 months to 11 years and 3 months. The trial court determined that an upward departure was warranted based on the following reasons:

(1) the complicity between Rebecca and Cristoval regarding their treatment of AV

(2) Rebecca and Cristoval singled out AV to be the subject of their physical attacks, undue punishment, and sexual assaults

(3) Rebecca and Cristoval tried to make it appear that AV was a “problem child” and that nobody would believe her if she told anyone about the sexual abuse

(4) the number of sexual assaults that occurred over a period of nearly three years

(5) the sexual assaults began shortly after AV turned 14 years old, just beyond the mandatory minimum sentence of 25 years if AV had been 13 years old when the assaults occurred

The trial court then stated:

I think all those are substantial and compelling reasons to deviate from the guidelines.

The question becomes what’s the proportionality in this matter. The Court’s of the opinion an approximate 50 percent on the top end of the guidelines, approximately 50 percent.

I’m going to sentence [Rebecca] to 216 months to the Michigan Department of Corrections to 600 months.

Thus, the trial court departed from the upper limit of the sentencing guidelines range (11 years and 3 months) and imposed a minimum 18-year sentence.

“Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record.” *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A substantial and compelling reason is “an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003) (quotation marks and citation omitted). “To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). A trial court may not base a departure on a factor already taken into account in determining the appropriate sentencing guidelines range unless the court finds that the factor has been accorded inadequate or disproportionate weight. *Smith*, 482 Mich at 300. In addition, the trial court’s reason or reasons for departure must support the particular departure imposed. *Id.* at 303. “A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Id.* at 304.

This Court reviews for clear error a trial court’s reasons given for a departure. *Id.* at 300. We review as a matter of law the trial court’s determination whether a reason is objective and

verifiable. *Id.* We review for an abuse of discretion both the extent of the departure and “[w]hether the reasons given are substantial and compelling enough to justify the departure” *Id.* “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Id.*

The trial court’s reasons for departing from the sentencing guidelines range were substantial and compelling. The record clearly shows that Rebecca and Cristoval were complicit regarding their treatment of AV. Thus, that reason is objective and verifiable. The sentencing guidelines do not account for a scenario in which a mother and stepfather together force a child to essentially become their sex slave. The record also clearly evidences that Rebecca and Cristoval targeted AV to be the subject of their physical attacks, undue punishment, and sexual assaults. That reason is also objective and verifiable. AV, CS, and “FH,” AV’s stepsister, all testified that AV was treated differently, received more punishment, and that Rebecca and Cristoval were abusive toward AV. FH maintained that Rebecca and Cristoval “picked on” AV. FH testified:

They [i.e., Rebecca and Cristoval] would try—they would, like, pick with her, or when she had a boyfriend, she would get in trouble for it. Or there would be a reason why they would have to put their hand[s] on her. And it would be abusive, like they would hit her head on the refrigerator or would put her over the counter like try [sic] to stop her or, you know, if she didn’t stop things, [Cristoval] used to hold her hands down and Rebecca would sit on her[], and they would put Benadryl down her, like make her take Benadryl.

The fact that Rebecca and Cristoval tried to make it appear that AV was a “problem child” and that nobody would believe her if she told anyone about the sexual abuse was also objective and verifiable. The record clearly evidences that AV was treated as the “problem child” as FH’s testimony, quoted above, demonstrates. The record shows that Rebecca and Cristoval looked for reasons to be physically abusive toward AV. AV also testified that they told her that nobody would believe her if she told anyone about the sexual abuse because she was a liar. Further, the sheer number of sexual assaults that occurred over a period of nearly three years was an objective and verifiable reason supporting the trial court’s departure. See *Smith*, 482 Mich at 301 (“That sexual abuse occurred over a long period is an objective and verifiable reason for departure. The abuse in this case was not something that was completed quickly.”)

The foregoing reasons keenly and irresistibly grab our attention, and it is beyond dispute that this case is an exceptional case. See *Babcock*, 469 Mich at 258. When departing from the sentencing guidelines range, the trial court also relied on the fact that Rebecca could have been sentenced to a 25-year mandatory minimum term if the sexual assaults had begun when AV was 13 years old instead of 14 years old. The trial court was incorrect. MCL 750.520b(2)(b) requires a 25-year minimum sentence only when a victim is under the age of 13.¹ In considering the

¹ MCL 750.520b(2) provides, in relevant part:

Criminal sexual conduct in the first degree is a felony punishable as follows:

length of a sentence in another context, however, it appears that the trial court was assessing the proportionality of Rebecca’s sentence, which it was required to do. See *Smith*, 482 Mich at 303-306. The court determined that an approximate 50-percent increase from the top of the guidelines range was appropriate based on all of the substantial and compelling reasons that it articulated. The approximate 50-percent increase amounted to a minimum sentence of 18 years.² An 18-year sentence is still years less than a 25-year minimum sentence, which would have been required if Rebecca had engaged in CSC I with AV only one time when AV was under the age of 13. Thus, the trial court fully explained the reasons for departure and their connection to the extent of the departure. Further, by comparing the instant case to a case which would have warranted a 25-year mandatory minimum sentence, the court articulated why the sentence it imposed is more proportionate than a sentence within the guidelines range would have been. *Id.* at 304. Accordingly, the trial court did not abuse its discretion by departing from the sentencing guidelines and imposing an 18-year minimum sentence.

II. DOCKET NO. 309710—CRISTOVAL

A. RIGHT OF CONFRONTATION

Cristoval first argues that he was denied his right of confrontation when the trial court unduly restricted his ability to cross-examine witnesses, thereby precluding him from introducing evidence to impeach AV’s credibility. We review for an abuse of discretion a trial court’s evidentiary decisions. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.” *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). “We review issues of constitutional law de novo.” *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

“The Confrontation Clause of the United States Constitution provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .’ US Const, Am VI.” *People v Fackelman*, 489 Mich 515, 524-525; 802 NW2d 552 (2011) (brackets in original). The right of cross-examination is implicit in the constitutional right of confrontation. *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). “The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988) (quotation marks, citations, and brackets omitted; emphasis in original). MRE 611(a)

* * *

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

² The trial court emphasized that it departed by “approximately” 50 percent. We note that an exact 50-percent departure from the upper limit of the sentencing guidelines range would have resulted in a minimum sentence of 16 years and 10-½ months.

grants a trial court discretion regarding the mode of interrogating witnesses and presenting evidence. “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” MRE 611(c). “The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society.” *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

1. PRIVATE INVESTIGATOR’S REPORT

On the second day of trial, the prosecutor discovered that Cristoval’s defense counsel possessed reports generated by a private investigator who spoke with several individuals, including Zavala, AV’s former boyfriend. Defense counsel did not turn over the reports to the prosecutor, who became aware of the report pertaining to Zavala approximately five minutes before Zavala testified. The prosecutor argued that she had previously submitted a discovery request, that the report did not constitute defense counsel’s work product and was discoverable, and that defense counsel’s failure to turn over the report constituted a discovery violation. The trial court agreed with the prosecutor and prohibited defense counsel from using the report during Zavala’s cross-examination. The court, however, did allow defense counsel to inquire of Zavala whether he was familiar with AV’s reputation for truth or veracity.

Cristoval argues that the report was not a statement written or signed by a witness and, as such, it was not discoverable. MCR 6.201(A)(2) requires a party to disclose upon request “any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant’s own statement[.]” In *People v Holtzman*, 234 Mich App 166, 178-179; 593 NW2d 617 (1999), this Court interpreted MCR 6.201(A)(2) and opined:

[O]nly written witness statements that have been signed or otherwise adopted or approved by the persons who made them, MCR 2.302(B)(3)(c)(i), and verbatim recorded statements as described in MCR 2.302(B)(3)(c)(ii) qualify as “statements” under MCR 6.201(A)(2). Interview notes taken by lawyers rarely satisfy this definition. Typically, interview notes contain rough paraphrases, summaries, and highlights of the witness’ comments, filtered through the attorney’s own subjective impressions of the witness. . . . Unless the “notes” were a “substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded,” or unless the witness signed or adopted the notes as his statement, they are not subject to disclosure under MCR 6.201(A)(2).

Here, the report was not a written statement signed, adopted, or approved by Zavala. Moreover, it was not a substantially verbatim statement that was contemporaneously recorded. As defense counsel explained during trial, “[the reports] are not statements, these are not recordings that have been verbatim translated. These are a summary of a detective’s work.” Thus, similar to the discussion of attorneys’ interview notes in *Holtzman*, it appears that the report in question contains paraphrases of Zavala’s statements and a summary of the private investigator’s impressions of Zavala. Regardless of the exact nature of the report, the record clearly shows that it does not contain Zavala’s signed, adopted, or approved written witness statement or a substantially verbatim statement made by Zavala that was contemporaneously recorded. As such, the report was not subject to mandatory disclosure under MCR 6.201(A)(2).

Notwithstanding that the report was not subject to disclosure under MCR 6.201(A)(2), we conclude that Cristoval was not denied his right to confront the witnesses against him when the trial court ruled that defense counsel could not utilize statements contained in the report during his cross-examination of Zavala. Pursuant to MRE 608(a), a witness's credibility "may be attacked or supported by evidence in the form of opinion or reputation," but "the evidence may refer only to character for truthfulness or untruthfulness" Thus, "MRE 608 allows the impeachment of a witness's credibility by evidence of the witness's reputation for truthfulness or untruthfulness." *People v Bieri*, 153 Mich App 696, 712; 396 NW2d 506 (1986). "The admissibility of such evidence is limited and the testimony of a character witness must be based upon what he has heard other people in the subject's residential or business community say about the subject's reputation." *Id.* Accordingly, the witness must have communicated with others in the community regarding the subject's truthfulness or lack thereof. See *People v Schultz*, 316 Mich 106, 109; 25 NW2d 128 (1946).

In this case, defense counsel sought to utilize the report during his cross-examination of Zavala to impeach AV's credibility. Defense counsel argued:

That's the secondary question I have. Am I precluded from questioning the young man. I'm presuming what he's going to say is what he said in the statement. The only thing he said that's helpful to us was that he could argue against a [MRE] 608 witness [sic]. He says, not in the most the best [sic] detail, but does she have a reputation for being a liar. [MRE] 608 allows for that questioning as long as you can show through a foundation that he knows her reputation in the community. Now, whether or not he can come back and explain to the jury why she is a liar, quite frankly, I don't believe that's there, and that's why we weren't going to call him. I guess my question is, am I precluded from that line of questioning.

The trial court ruled that defense counsel could ask Zavala if he is familiar with AV's reputation for truth and veracity in the community. Defense counsel responded, "[t]hat was all I planned on doing." On cross-examination, defense counsel questioned Zavala as follows:

Q. As far as her reputation for telling the truth or telling lies, what is her reputation in regards to that?

THE COURT: If you know.

MR. WHITE [defense counsel]: If you know.

A. No, I don't really know.

Thus, the record shows that defense counsel was permitted to ask about AV's reputation for truth and veracity in the community, but that Zavala was unaware of her reputation. Counsel indicated that that was all that he wished to utilize the report for during his cross-examination of Zavala. Cristoval does not argue on appeal that he was erroneously denied the opportunity to utilize the report for any other purpose. Because Zavala testified that he was unaware of AV's reputation for truth or veracity in the community, he could not have offered testimony regarding AV's reputation for truthfulness or untruthfulness. MRE 608(a); *Schultz*, 316 Mich at 109; *Bieri*,

153 Mich App at 712. A defendant's right to confront witnesses against him is not without limitation. *Adamski*, 198 Mich App at 138. A defendant must still comply with established evidentiary rules designed to ensure the fairness and reliability of a verdict. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). Because Zavala testified that he was unaware of AV's reputation for truth or veracity in the community, he could not have testified regarding AV's reputation, and Cristoval was not denied his right to confront witnesses against him when the trial court precluded defense counsel from utilizing the private investigator's report during his cross-examination of Zavala.

2. POSTCARD

Cristoval next argues that the trial court erroneously prohibited defense counsel from cross-examining FH regarding a postcard that she had sent to Cristoval. The prosecutor objected to defense counsel's use of the postcard, and the trial court prohibited the cross-examination on the basis that defense counsel did not disclose the postcard to the prosecutor before trial. When asked whether he had any comments regarding the court's ruling for the record, defense counsel responded, "[n]o." Notwithstanding the trial court's ruling, the court permitted defense counsel to question FH as follows:

Q. [FH], do you remember when you were sending your dad [i.e., Cristoval] postcards?

A. No.

Q. Has it been in the last year?

A. What do you mean?

Q. Did you send your dad some postcards within the last year?

A. No, meaning 2011?

Q. 2011. So this is 2012, and we're in the month of January, I think. I'm losing track too, but so would it have been between last January and this January, do you recall?

A. I don't remember then.

Q. Okay. Um, was it—was it after [AV] made the allegations against him? Do you recall if it was then?

A. Like, after [AV] came out, yes.

Q. Yes, ma'am. It was after that, okay.

Therefore, notwithstanding the trial court's ruling precluding defense counsel from utilizing the postcard during cross-examination, counsel was permitted to elicit testimony that FH sent Cristoval postcards after AV made the sexual abuse allegations against him. Thus, the trial court

did not deny Cristoval an opportunity to question FH regarding that postcard in this respect, and Cristoval has failed to establish that the trial court's ruling denied him his right of confrontation.³

3. CROSS-EXAMINATION OF AV

Cristoval next argues that he was denied his right of confrontation when the trial court precluded defense counsel from asking AV whether she had made accusations that someone tried to abduct her in a park in 2008, whether she had threatened to kill her siblings, and whether she used drugs or alcohol at the time of the alleged sexual abuse. The prosecutor objected to every question on the basis of relevance, and the trial court sustained the objections.

“Generally, all relevant evidence is admissible, while irrelevant evidence is not admissible.” *People v Moore*, 246 Mich App 172, 174; 631 NW2d 779 (2001). “Relevant evidence” is “evidence 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.” MRE 401. The trial court did not abuse its discretion by determining that the evidence that defense counsel sought to elicit from AV was irrelevant and therefore inadmissible. Whether AV had previously threatened to kill her siblings and whether she used drugs or alcohol at the time of the abuse did not have any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. The ultimate issue was whether Rebecca and Cristoval committed the acts alleged. Whether AV had threatened to kill her siblings and whether she used drugs or alcohol during the abuse was not relevant to that question.

Similarly, whether AV made accusations that someone had tried to abduct her in a park in 2008 was not relevant to that question. Contrary to Cristoval's assertion in his brief on appeal, defense counsel did not seek to ask AV whether “she accused someone of trying to abduct her in a park[.]” Rather, defense counsel sought to ask AV whether she had made “accusations that somebody tried to abduct [her] in 2008 in a park[.]” The former question implies that AV accused a specific person of trying to abduct her, while the latter question sought to ask AV whether she had made a general accusation that somebody had tried to abduct her. Although perhaps neither question was relevant, significantly, counsel did not seek to ask AV whether she had previously made accusations against a specific person that were purportedly untrue. Accordingly, the evidence was not relevant, and the trial court properly sustained the prosecutor's objections. Because a defendant's right to confront witnesses against him is not without limitation and he must still comply with established evidentiary rules, Cristoval was not denied his right of confrontation when the trial court limited the scope of defense counsel's cross-examination of AV. *Hayes*, 421 Mich at 279; *Adamski*, 198 Mich App at 138.

4. EXAMINATION OF MICHELLE DODGE

³ We address Cristoval's additional Confrontation Clause argument regarding the postcard in section II(B), *infra*.

Cristoval next contends that the trial court impermissibly refused to allow defense counsel to ask Michelle Dodge whether anything had caused Dodge to question AV's veracity. Dodge is the mother of Giovanni Limes, AV's ex-boyfriend. During trial, AV was pregnant with Limes's child. Defense counsel questioned Dodge as follows:

Q. Okay. If—if you're able, were there any—was there anything that caused you to begin to question the veracity or truthfulness of some of [AV's] statements?

MS. ROUSSEAU [the prosecutor]: Objection as to relevance.

THE COURT: Yeah, improper questioning. I don't think you can ask that.

The record shows that the trial court did not sustain the prosecutor's objection on the basis of relevance, but rather, on the basis that it was an improper question. It appears that defense counsel was attempting to elicit character evidence without following the prerequisites of MRE 608(a). As previously stated, "MRE 608 allows the impeachment of a witness's credibility by evidence of the witness's reputation for truthfulness or untruthfulness." *Bieri*, 153 Mich App at 712. The admissibility of such evidence, however, must be based on what the person offering the evidence has heard from other people in the subject's community regarding the subject's truthfulness or lack thereof. *Schultz*, 316 Mich at 109; *Bieri*, 153 Mich App at 712. Defense counsel's inquiry of Dodge regarding AV's truthfulness or untruthfulness did not follow the proper formula for the admissibility of character evidence under MRE 608(a). In particular, counsel did not ask Dodge whether she was familiar with AV's reputation for truthfulness or veracity in the community. Thus, the trial court did not abuse its discretion by determining that counsel's question was improper. Because a defendant must comply with established evidentiary rules, Cristoval was not denied his right of confrontation when the trial court precluded defense counsel from inquiring of Dodge whether AV was truthful or untruthful. *Hayes*, 421 Mich at 279; *Adamski*, 198 Mich App at 138.

5. EXAMINATION OF CRISTOVAL HERNANDEZ, JR.

Cristoval next argues that the trial court erroneously prohibited defense counsel from inquiring of Cristoval Jr. regarding purported statements that FH had made to him. The trial court allowed the prosecutor, over Cristoval's objection, to present FH's and CS's testimony regarding uncharged sexual acts committed by Cristoval pursuant to MCL 768.27a.⁴ Sixteen-year-old FH testified on direct examination:

⁴ MCL 768.27a(1) provides, in pertinent part:

[I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

Q. At the house on Irvington Street, I'm going to orient you to a time here. Was there a time that you were suspended from school?

A. Yes.

Q. And when you were suspended from school that day, who was home?

A. I can't do this.

Q. Okay. Take your time. We're going to do easy questions, okay? Let me ask you this: You're having a hard time today. Why is it hard for you today?

A. Because I don't feel comfortable.

Q. Okay. And what about the situation doesn't make you feel comfortable?

A. The whole thing.

Q. Okay. Is it because—

MR. WHITE: Objection, leading.

* * *

Q. Okay. We're going to go real slow, okay?

Is it because of what you have to say? I'm not going to ask you what it is, but is it because of what you have to say that is uncomfortable for you?

A. Yes.

Q. Is that a yes?

A. (Nodding head, yes.)

Q. Is it because what you have to say is something that happened?

A. Yes.

Q. And who did it happen to? I'm not going to ask you what happened. Who did it happen to?

A. Me.

Q. And who did that to you? Was it Rebecca Hernandez who did it to you?

A. I can't do this.

* * *

Q. Okay. This thing that happened to you, [FH], how many times did it happen?

A. Once.

Q. And did you ever talk to Rebecca Hernandez about that thing—

A. No.

Q. —after it happened? Is Rebecca Hernandez the one who did it to you?

A. No.

Q. Did you ever talk to Cristoval Hernandez after it happened?

A. No.

Q. And was he the one who did that to you?

A. (No response.)

Q. How do you feel about your dad?

A. (No response.)

Q. Do you love him?

A. (No response.)

Q. [FH], we're almost done. I promise.

Do you love your dad?

A. I can't do this.

Q. You want to stop?

A. Yes.

MS. ROUSSEAU: Your Honor, I'm going to stop questioning.

THE COURT: Do you need a break, [FH]? You want to take a few minutes before we resume?

THE WITNESS: (Crying.)

After FH testified, defense counsel sought to elicit testimony from Cristoval Jr. that FH had denied that Cristoval sexually assaulted her. Counsel argued that FH's statement to Cristoval Jr. would not be hearsay because it would not be offered for its truth, but rather, as a prior inconsistent statement of FH. Counsel acknowledged that FH never actually testified that Cristoval had sexually assaulted her, but maintained that FH's body language, behavior, and inferences could allow the jury to infer that Cristoval sexually assaulted her. The trial court refused to allow the testimony on the basis that there was no testimony to impeach because FH did not testify that Cristoval sexually assaulted her. The court recognized that defense counsel could have cross-examined FH regarding her purported accusation but did not do so.

The trial court did not abuse its discretion by excluding Cristoval Jr.'s testimony. Cristoval sought to admit the testimony as a prior inconsistent statement. Under MRE 613, a party may impeach a witness with his or her prior statement. MRE 613(b) provides that extrinsic evidence, i.e., Cristoval Jr.'s testimony, "of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." It is axiomatic that in order to impeach a witness with a prior inconsistent statement, there must have been a statement made during trial that is inconsistent with the prior statement. Here, FH did not make a statement that was inconsistent with her purported prior statement to Cristoval Jr. Rather, FH did not say anything when asked whether Cristoval had sexually assaulted her. While it can be argued that FH's actions and body language implied that Cristoval had sexually assaulted her, FH did not actually testify as such. Accordingly, there was no statement made during trial to impeach. Moreover, Cristoval was not denied his right to confront the witnesses against him because, as the trial court recognized, defense counsel could have cross-examined FH regarding whether Cristoval had sexually assaulted her, but counsel failed to do so. Thus, the trial court did not abuse its discretion by excluding the evidence, and Cristoval was not denied his constitutional right of confrontation.

B. RIGHT TO CONFRONT AND IMPEACH "FH"

Cristoval next argues that he was denied a fair trial and his right of confrontation when the trial court denied his motion for a mistrial after the prosecutor asked FH improper, leading questions that resulted in Cristoval being unable to confront FH. "We review issues of constitutional law de novo." *Benton*, 294 Mich App at 203. We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). We also review for an abuse of discretion a trial court's decision whether to allow leading questions. *People v Kusters*, 175 Mich App 748, 756; 438 NW2d 651 (1989).

Cristoval contends that the trial court abused its discretion by allowing the prosecutor to ask FH leading questions and by denying his motion for a mistrial as a result of the leading questions. The prosecutor's questioning of FH is set forth in section II(A)(5) above. MRE 611 provides, in relevant part:

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the

truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

* * *

(d) Leading Questions.

(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.

In addition, this Court has recognized that a prosecutor may be provided considerable leeway to ask leading questions of a child witness. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

The trial court did not abuse its discretion by allowing the prosecutor to ask FH leading questions. Initially, we note that many of the prosecutor's questions were not leading. Black's Law Dictionary (9th ed) defines "leading question" as "[a] question that suggests the answer to the person being interrogated; esp., a question that may be answered by a mere 'yes' or 'no.'" The prosecutor asked FH several questions that were not leading, including "[h]ow do you feel about your dad?" The prosecutor also asked FH whether Rebecca was the person who did "this thing" to her. In any event, a review of the record shows that the prosecutor's leading questions were necessary to attempt to develop FH's testimony as stated in MRE 611(d)(1). FH was 16 years old at the time of trial, and the incident that occurred to her happened when she was only 14 years old. It is clear from her testimony that she was very distraught and needed guidance to develop her testimony. As the trial court stated:

The Court concludes that leading questions were necessary. I don't think that—the objection wasn't really raised at the onset. The objection was raised, as the Court recalls, at the time it got to whether or not [Cristoval] and [Rebecca] were involved.

The witness, who is sixteen years of age, apparently at the time of the incident was fourteen years of age and clearly was very emotional. And I did not feel that the questions elicited by the Prosecution were—I mean, really they—I mean under the circumstances, I probably would have allowed more.

* * *

I think [the prosecutor] stuck to the basics and simply got the attempt to elicit basic facts. And I guess on cross-examination, you know, you [i.e., defense counsel] can go into it in further detail.

Further, as previously recognized, the prosecutor's questions did not elicit testimony from FH because she became overwhelmed, unresponsive, and stated "I can't do this." Thus, the prosecutor's leading questions were not effective in eliciting the prosecutor's desired testimony. In sum, the trial court did not abuse its discretion by allowing the prosecutor to ask FH leading questions and, accordingly, did not abuse its discretion by denying Cristoval's motion for a mistrial.

Cristoval also contends that FH's refusal to answer questions following the inference created by the prosecutor's leading questions that he had sexually assaulted her prevented him from confronting FH to attempt to impeach her accusation. Cristoval's argument lacks merit. Defense counsel was provided an opportunity to cross-examine FH and he did so. Notably, he did not ask FH any questions regarding her accusation against Cristoval. As previously recognized, "[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Owens*, 484 US at 559. Because defense counsel had an opportunity to cross-examine FH regarding her accusation, Cristoval was denied his right to confront FH.

Cristoval further argues that he was denied his right to confront FH because the trial court excluded the postcard that she had sent Cristoval in which she stated that she loved him. It appears that Cristoval is arguing that he should have been permitted to use the postcard to impeach FH's accusation that he had sexually assaulted her. Again, Cristoval's argument lacks merit. It was clear from FH's testimony that she loved her father and did not want to testify against him. She was unresponsive to some questions, including when the prosecutor asked her if she loved her dad. At one point, FH exclaimed, "I just want to get out of here. I want to go home." The postcard in which FH stated that she loved her father would not have impeached her testimony, but rather, would have been corroborative of the clear inference that she loved her father. Accordingly, Cristoval was not denied his right to confront FH nor was he denied a fair trial.

C. TESTIMONY REGARDING "GROOMING"

Cristoval next argues that he was denied his right to a fair trial when the trial court qualified Detective Elizabeth Reust as an expert in "grooming" and admitted Reust's and Officer Matthew Walters's testimony that Cristoval had "groomed" CS. Because Cristoval did not preserve his argument regarding Walters's testimony by objecting to the testimony below, our review of that issue is limited to plain error affecting his substantial rights. *People v Orlewicz*, 293 Mich App 96, 106; 809 NW2d 194 (2011). This Court reviews preserved constitutional issues de novo. *Benton*, 294 Mich App at 203. We review for an abuse of discretion a trial court's evidentiary decisions. *Danto*, 294 Mich App at 598-599. We also review for an abuse of discretion a trial court's determination whether a witness qualifies as an expert. *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986).

As previously stated, the trial court allowed the prosecutor, over Cristoval's objection, to present FH's and CS's testimony pursuant to MCL 768.27a. During the direct examination of Walters, the prosecutor asked Walters to describe "grooming," to which Walters responded:

That's when a perpetrator is trying to break barriers with the victim by slowly manipulating the environment to make physical contact between the alleged perpetrator and the victim, creating a relationship with the victim. And they're getting the victim more comfortable and familiar with them. And over time special treatment, physical contact, that starts off innocent, that progresses to be more intense and more severe.

When asked about "special treatment," Walters's testified:

Spending more and more time. They get more attention than other children in the home. They get treats or gifts whereas the other children don't and just more favoritism and more attention.

Walters testified that he became concerned during his investigation that Cristoval was "grooming" CS.

Seventeen-year-old CS testified that when she lived with Rebecca and Cristoval she had a cell phone and none of the other children had a cell phone. She testified that Cristoval used to "spoil [her]" and would not spoil the other children as much as her. She recalled that Cristoval took her to school in the morning, bought snacks for her, and picked her up from school. He did not do those things for the other children. CS claimed that she had a good relationship with Cristoval while she lived with him. She testified that things started to change after AV left the home. According to CS, she and Cristoval used to play the "nozzle game," which involved Cristoval licking his hand and putting it all over CS's face. CS claimed that she hated the game at first, but then started doing it back to Cristoval. Cristoval also gave CS "wet willy's" by licking his finger and sticking it in her ear. They also played a game where they would pinch each other, but Cristoval kept pinching her on her leg "higher up to [her] private areas[.]" CS also testified regarding an incident in the kitchen when Cristoval put his arms around her and put his hands inside the front of her pants. He unbuttoned her pants and tried to unbutton his pants, but her brother walked into the room, and he stopped.

In addition to Walters's testimony, the trial court qualified Detective Reust as an expert in "grooming" over Cristoval's objection. Reust testified that "[g]rooming is the process of preparing the environment and a child to be sexually abused," including reducing the likelihood that the child will disclose the abuse. Reust testified that oftentimes an offender will provide a child with special treats or incentives that other children do not receive. Reust opined that the nozzling that CS described was a grooming technique.

Cristoval argues that the trial court abused its discretion by qualifying Reust as an expert in grooming. A trial court may allow a witness who is qualified "by knowledge, skill, experience, training, or education" to testify as an expert if the court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" MRE 702. This Court has previously addressed the admission of expert testimony regarding grooming. In *People v Petri*, 279 Mich App 407, 415-416; 760 NW2d 882 (2008), a detective was permitted to testify as an expert about grooming. In that case, Detective Domine testified that based on what the victim's mother told him, he was concerned that the defendant had been grooming the victim. *Id.* This Court rejected the notion that expert testimony was necessary, stating:

Because there is no indication that Detective Domine was offering a technical or scientific analysis of the behavior of child sex abusers, it was not necessary that the prosecutor qualify Detective Domine as an expert. Cf., e.g., *People v McLaughlin*, 258 Mich App 635, 657-658; 672 NW2d 860 (2003) (lay opinion admissible under MRE 701 where it was largely based on common sense and did not involve highly specialized knowledge).

Even assuming that it was necessary that Detective Domine be qualified as an expert witness to give his brief testimony regarding “grooming,” any error was harmless, because Detective Domine [sic] would have qualified. Detective Domine testified that he had 15 years of experience with the Livingston County Sheriff’s Department, and received training in the forensic interviewing of children. A police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases. MRE 702; *People v Dobek*, 274 Mich App 58, 76-79; 732 NW2d 546 (2007). In any event, we conclude that expert testimony was not necessary to assist the jury in evaluating the evidence of the events leading up to the July 14, 2005, incident underlying the charge. [*Petri*, 279 Mich App at 416-417.]

On the other hand, in *People v Ackerman*, 257 Mich App 434, 445; 669 NW2d 818 (2003), this Court opined:

“The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case.” *People v Coy*, 243 Mich App 283, 294-295; 620 NW2d 888 (2000), quoting *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). In addressing this question, we apply common sense to determine whether an untrained layman could determine intelligently and to the best possible degree the issue involved without the aid of experts. *Smith, supra* at 106. We believe that most of our citizen-jurors lack direct knowledge of or experience with the typical forms of conduct engaged in by adults who sexually abuse children. Accordingly, the trial court reasonably concluded that testimony about the typical patterns of behavior exhibited by child sexual abuse offenders would aid the jury. MRE 702.

Thus, this Court determined in *Petri* that it was not necessary for the prosecutor to qualify Detective Domine as an expert in order for him to testify about grooming. In *Ackerman*, however, this Court determined that expert testimony regarding the behaviors of adults who sexually abuse children was necessary because a typical juror lacks knowledge and experience regarding those behaviors.

Regardless whether expert testimony was or was not necessary in the instant case, we conclude that any error in qualifying Reust as an expert was harmless. As is discussed in *Petri*, 279 Mich App at 416, a police witness may be qualified as an expert on the basis of training and experience in child sexual abuse cases. Reust testified that she had worked as a police officer for 22 years and as a detective in particular for 12 years. She investigated crimes involving children for nearly the entire time that she had worked as a detective and received training in that area. Reust also taught at various conferences and police departments regarding how to investigate abuse involving children. She had received training regarding grooming in particular and had conducted at least 700 forensic interviews with children. Thus, based on Reust’s training and experience, she qualified as an expert in grooming.

Moreover, any error in qualifying Reust as an expert was harmless because Reust’s testimony regarding grooming, presented on the fourth day of trial, was nearly identical to Walters’s lay testimony regarding grooming, presented on the second day of trial. Both

witnesses described grooming in the context of child sexual abuse and testified that it was a manner in which a perpetrator prepared a victim for sexual abuse. Because Reust's testimony essentially mirrored Walters's testimony, any error in qualifying Reust as an expert was harmless.

Cristoval also argues that Reust improperly testified that the nozzling behavior between Cristoval and CS constituted grooming.⁵ After Reust testified regarding grooming generally, she opined, "[t]he nozzling that [CS] described, the licking of your hand and rubbing it on the child's face and in the context that it's been described, I would say that is part of a grooming technique." Reust's opinion that the nozzling constituted grooming was the primary distinction between Reust's testimony and Walters's testimony with respect to grooming. Cristoval argues that the testimony was improper because sexual abuse experts are permitted to testify regarding behavior patterns generally and may not invade the province of the jury by offering an opinion regarding whether sexual abuse occurred or by vouching for the victim's credibility. In *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), modified 450 Mich 1212 (1995), our Supreme Court recognized that "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." Reust's testimony that the nozzling constituted grooming did not implicate these concerns, all of which involve the ultimate issue to be determined in a case. Whether sexual abuse occurred and whether a defendant is guilty is usually the ultimate issue to be determined by the fact-finder. Reust's testimony, on the other hand, pertained to a relevant but collateral matter, i.e., whether Cristoval was grooming CS for sexual abuse. None of the charges against Cristoval pertained to CS and, accordingly, Reust's testimony did not vouch for her veracity. Because the testimony was not improper, its admission did not deny Cristoval his right to a fair trial.

D. OTHER ACTS EVIDENCE

Cristoval next contends that he was denied a fair trial when the trial court admitted evidence of uncharged sexual acts involving both FH and CS and evidence of physical abuse involving AV. We review de novo issues of constitutional law. *Benton*, 294 Mich App at 203. We review for an abuse of discretion a trial court's evidentiary decisions. *Danto*, 294 Mich App at 598-599.

1. UNCHARGED SEXUAL ACTS

Cristoval argues that the trial court erred by admitting under MCL 768.27a CS's and FH's testimony regarding Cristoval's sexual contact with them without first determining whether the testimony was relevant or weighing its probative value against its prejudicial effect. MCL 768.27a(1) provides, in relevant part:

⁵ Cristoval erroneously contends that Walters, as well as Reust, testified that the nozzling behavior constituted grooming. The record reflects that only Reust testified as such.

[I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

Although the trial court did not explicitly state that it found CS's and FH's purported testimony to be relevant, the court ostensibly determined that such testimony was relevant because it admitted the testimony under MCL 768.27a. As previously explained, FH did not actually testify regarding any sexual contact between she and Cristoval because she became emotional and was unable to answer questions about the purported contact. FH's testimony thus merely created an inference that a sexual assault had occurred. CS testified that Cristoval pinched her leg and kept pinching her "higher up to [her] private areas[.]" She also testified that Cristoval put his hands inside the front of her pants in the kitchen. Such testimony and inference were relevant to AV's credibility and were therefore relevant to the ultimate issue in the case, i.e., whether Cristoval sexually assaulted AV. As our Supreme Court stated in *People v Watkins*, 491 Mich 450, 475; 818 NW2d 296 (2012):

Evidence of guilt in child molestation cases is typically hard to come by because in most cases the only witness is the victim, whose testimony may not be available, helpful, or deemed credible because of his or her age. It may also be difficult for a jury to believe that a defendant is capable of engaging in such egregious behavior with a child.

Thus, CS's testimony and the inference created by FH's testimony were relevant because they tended to support AV's credibility.

Cristoval also argues that the trial court failed to balance the prejudicial effect of the testimony against its probative value.

[E]vidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." [*Watkins*, 491 Mich at 481.]⁶

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, the prejudicial effect of CS's testimony and the inference created

⁶ Although our Supreme Court decided *Watkins* after the trial in this case, judicial decisions are generally accorded complete retroactive effect and "[c]omplete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996) (quotation marks and citation omitted). Because *Watkins* did not overrule clear and uncontradicted case law, it may be applied retroactively.

by FH's testimony did not substantially outweigh the probative value of the evidence. The inference created by FH's testimony was that Cristoval did "something" to her. FH was unable to describe what happened to her. CS testified that Cristoval pinched her high up her leg and put his hands inside the front of her pants. Compared to AV's testimony that described numerous sexual assaults and various sexual activity, FH's and CS's testimony described much less egregious behavior. Therefore, we conclude that the prejudicial effect of the testimony did not substantially outweigh its probative value.

2. PHYSICAL ABUSE INVOLVING AV

Cristoval also argues that the testimony regarding the physical abuse of AV, including forcing her to take Benadryl, was not relevant and that the prejudicial effective of the evidence outweighed its probative value. AV testified that Rebecca and Cristoval often hit her. She described an incident in which Rebecca hit her and she punched Rebecca in the mouth. Then Cristoval became involved in the altercation and punched AV in the face. AV also testified that Rebecca and Cristoval often grabbed her by her throat or her hair. She further claimed that Rebecca and Cristoval forced her to take Benadryl because it calmed her down and made her drowsy. According to AV, Rebecca and Cristoval sometimes pinned her down and one of them would pour Benadryl into her mouth. They sometimes forced her to have sex with them afterward when she was drowsy or disoriented. Both CS and FH corroborated AV's testimony that Rebecca and Cristoval were abusive toward AV and forced her to take Benadryl.

Our Supreme Court has recognized:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (citations omitted).]

Thus, under the "res gestae" exception to MRE 404(b), which precludes the admission of other bad acts evidence to prove guilt of the charged offense, "evidence of prior 'bad acts' is admissible where those acts are 'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

The testimony regarding AV's physical abuse and the fact that she was forced to take Benadryl was relevant to describe the "complete story" of what occurred in Rebecca and Cristoval's household and their treatment of AV generally.⁷ The evidence demonstrated

⁷ Notably, Rebecca testified that she never loved AV, did not have a bond with her, that she could not stand the sight of AV, and that even AV's voice irritated Rebecca.

Rebecca and Cristoval's clear lack of respect for AV as a human being and their view of AV as merely an object. The testimony was relevant to the charged offenses because it described the atmosphere in the household as it pertained to AV. The testimony was also more probative than prejudicial given that it painted the entire picture of AV's treatment in the household and tended to show AV's credibility. Accordingly, the trial court did not abuse its discretion by admitting the evidence, and Cristoval was not denied a fair trial.

E. ADMISSION OF PORNOGRAPHIC MOVIES

Cristoval next argues that the trial court erred by admitting into evidence a box of pornographic movies found in Rebecca and Cristoval's home. We review for an abuse of discretion a trial court's evidentiary decisions. *Danto*, 294 Mich App at 598-599.

Detective Reust testified that she recovered from Rebecca and Cristoval's home numerous pornographic DVDs and VHS tapes that she placed in a box. Some of the movies focused on anal sex, some focused on the fact that the girls depicted were young, and some were cartoons or anime movies that depicted characters engaging in sex acts. Reust testified that some of the anime characters were young girls who were bound and gagged. She further testified that one series of movies focused on raping young girls and that one animated cartoon video depicted a young girl in a school uniform being raped by an older man. Another video depicted cartoon characters like Snow White or Cinderella dancing through the woods and being raped by men that they came across.

Generally, all relevant evidence is admissible and irrelevant evidence is inadmissible. *Moore*, 246 Mich App at 174. "Relevant evidence" is "evidence 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." MRE 401. "The threshold [for determining relevance] is minimal: 'any' tendency is sufficient probative force." *Crawford*, 458 Mich at 398. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice" MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398.

The trial court did not abuse its discretion by admitting the pornographic movies into evidence. The movies were relevant in that they tended to support AV's credibility. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995) (evidence may be admitted to assist the fact-finder in evaluating the credibility of witnesses). AV testified that Cristoval showed her a pornographic movie that depicted people dressed up in costumes having sex with each other. AV's testimony indicates that Cristoval showed her pornographic movies on other occasions as well given her testimony that "every time" he showed her a pornographic movie, the volume was turned down or muted so that others would not hear it. The movies were also relevant to the charge of disseminating sexually explicit matter to a minor.

In addition, the movies tended to support AV's allegations regarding the particular conduct that Cristoval engaged in with her. AV testified that Cristoval engaged in anal sex with her, and the movies that focused on anal sex tended to support that claim. The movies depicting young girls also tended to support AV's testimony because AV was a minor when all of the

sexual activity occurred. The movies depicting rape or violent sex acts also tended to support AV's credibility given her testimony that she was crying and that "[i]t hurt really bad" when Cristoval engaged in digital-anal penetration with her. She testified that she tried to move away from Cristoval but that he would not let her and pushed his fingers deeper inside her while she was crying. AV also testified that the first time that Cristoval engaged in penile-anal penetration with her, he held her hands behind her back while she cried and asked him stop. AV further testified that if she refused to engage in sexual acts with Rebecca and Cristoval, they would punch her or beat her. She therefore stopped refusing to participate in the activities. Further, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.⁸ The movies were not merely marginally probative given that they tended to support AV's credibility. In fact, they were probative of the ultimate issue to be determined, i.e., whether Cristoval engaged in various sexual acts with AV and disseminated sexually explicit material to her. Accordingly, the trial court did not abuse its discretion by admitting the evidence.

F. SENTENCING—UPWARD DEPARTURE

Finally, Cristoval challenges the trial court's upward departure from the sentencing guidelines on his CSC I convictions. Cristoval's sentencing guidelines range was 108 to 180 months, or 9 to 15 years. The trial court determined that an upward departure was warranted based on the following reasons:

- (1) AV was singled out in the household for abuse and Rebecca and Cristoval tried to classify her as a "problem child"
- (2) the sentencing guidelines do not account for a stepfather and a mother forcing a child to engage in multiple sex acts with them
- (3) the sentencing guidelines do not account for the 3-year length of time that the sexual abuse occurred
- (4) one of the reasons that AV did not say anything about the abuse was because she feared that CS would be victimized if she did so
- (5) once AV left the house, Cristoval did in fact turn to CS and sexually assaulted her
- (6) AV was exposed to "all types of sexual acts, pornographic materials, sex aids, and being compelled to perform a sexual act on her mother"
- (7) Rebecca beat AV when AV was noncompliant with sexual acts

⁸ We note that the trial court did not allow the movies to be viewed during trial on the basis that doing so would be prejudicial to Cristoval. Thus, Reust described what she saw in the movies instead of playing them before the jury.

(8) although FH's testimony was vague, it was reasonable to conclude that Cristoval did "something" to FH, showing that he simply "move[d] on" to the next victim when AV was not available

Regarding proportionality, the trial court stated:

Now, the question becomes: What is the portion that I'm going to exceed the guidelines. And the Court's going to select a 50 percent number that's exceeding. The Prosecution asks that it be doubled.

The Court, bearing in mind that [AV] was close, I think she just turned 14 when this has happened. So if she would have been 13 when this happened, the offense would have had a 25-year mandatory minimum.

So the Court, in looking at what's proportionate here, selected a 50 percent figure for the reasons stated that these factors were not considered.

Accordingly, the trial court departed from the upper limit of the sentencing guidelines range by 50 percent and imposed a 22-½-year minimum sentence.

The trial court's reasons for departure were substantial and compelling. As previously discussed with respect to Rebecca, the record fully demonstrates that AV was targeted in the household for abuse and that Rebecca and Cristoval attempted to portray her as a "problem child." This reason was therefore objective and verifiable. The trial court also properly determined that the sentencing guidelines do not account for a stepfather and a mother forcing a child to engage in multiple sex acts with them. Cristoval was convicted of CSC I pursuant to MCL 750.520b(1)(b)(i), which involves sexual penetration with a person who is at least 13 but less than 16 years of age and that the defendant be a member of the same household as the victim. The fact that the sexual activity involved AV's biological mother and stepfather, however, was not accounted for in MCL 750.520b(1)(b)(i) or in the sentencing guidelines. Further, as previously stated with respect to Rebecca, the fact that the sexual assaults occurred over a three-year period was an objective and verifiable reason supporting the trial court's departure. See *Smith*, 482 Mich at 301 ("That sexual abuse occurred over a long period is an objective and verifiable reason for departure. The abuse in this case was not something that was completed quickly.")

The trial court also departed because one of the reasons that AV did not report the abuse was because she feared that CS would be victimized if she did so. That reason was objective and verifiable. AV testified that Cristoval had told her that if she said anything, he would sexually assault CS. Moreover, Cristoval did in fact sexually assault CS after AV left the house. CS testified that after AV moved out of the house, Cristoval put his hands inside the front of her pants while they were standing in the kitchen. That particular reason for departure was therefore objective and verifiable. Likewise, the record shows that Cristoval did "something" to FH when FH was suspended from school one day. Although FH was unable to state exactly what occurred, it is clear that Cristoval perpetrated some form of sexual assault on FH. Thus, the trial court's departure on the basis that Cristoval did "something" to FH was objective and verifiable

as was the trial court's reasoning that Cristoval appeared to move on to the next victim in the household when AV was no longer available.

Further, the trial court's departure on the basis that AV was exposed to numerous sexual acts, pornographic materials, and sexual aids was objective and verifiable. AV described numerous instances of sexual penetration involving her, Cristoval, and Rebecca, including anal-penile, anal-digital, vaginal-penile, vaginal-digital, fellatio, cunnilingus, and the use of a dildo. The fact that Cristoval forced AV to perform sexual acts on her mother was also objective and verifiable. The record shows that Cristoval often engaged in particular sex acts with Rebecca first and then compelled AV to engage in the same act. Moreover, the trial court departed from the sentencing guidelines on the basis that Rebecca beat AV when AV was noncompliant with sexual acts. Although the trial court stated only Rebecca's name when articulating that reason for departure, the record clearly shows that whenever Rebecca beat AV, Cristoval joined Rebecca and assisted Rebecca in beating AV. Both AV and FH testified that Cristoval intervened in Rebecca and AV's physical altercations and helped Rebecca beat AV. Thus, that particular reason that the trial court articulated pertained to Cristoval as well as Rebecca and was objective and verifiable.

The foregoing reasons for departure keenly and irresistibly grab our attention. Moreover, this case is an exceptional case. See *Babcock*, 469 Mich at 258. With respect to the extent of the departure, as with Rebecca, the trial court relied on the fact that Cristoval could have been sentenced to a 25-year mandatory minimum term if the sexual assaults had begun when AV was 13 years old instead of 14 years old. As previously discussed, the trial court was incorrect and MCL 750.520b(2)(b) requires a 25-year minimum sentence only when a victim is under the age of 13. Nevertheless, the record shows that the trial court considered the length and the circumstances that necessitated a mandatory 25-year sentence when it assessed the proportionality of a 50-percent departure for Cristoval's sentence. The trial court was required to determine the proportionality of the sentence that it imposed. See *Smith*, 482 Mich at 303-306. The court determined that a 50-percent increase above the top of the guidelines range was appropriate based on all of the substantial and compelling reasons that it articulated. Because the trial court explained its reasons for departure, their connection to the extent of the departure, and why its sentence was more proportionate than a sentence within the guidelines range, the trial court did not abuse its discretion by departing from the sentencing guidelines by 50 percent.

Affirmed in both appeals, but we remand Docket No. 309431 for the limited purpose of correcting Rebecca's judgment of sentence to reflect that she was convicted of six, rather than seven, counts of CSC I. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra