

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT BABUR BASAT,

Defendant-Appellant.

UNPUBLISHED

May 10, 2005

No. 252518

Oakland Circuit Court

LC Nos. 2003-188269-FC;

2003-188270-FC

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Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of possession of child sexually abusive material, MCL 750.145c(4), in LC No. 2003-188269-FC. The case involved two victims, J.B. and H.B., who were brother and sister. Defendant was sentenced to concurrent prison terms of forty to eighty years each for the first-degree CSC convictions.<sup>1</sup> In a separate case, defendant was convicted of two counts of first-degree CSC, MCL 750.520b(1)(a), and one count of second-degree CSC, MCL 750.520c(1)(b), in LC No. 2003-188270-FC. The latter case involved R.H., a victim unrelated to J.B. and H.B. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of fifty to eighty years each for the first-degree CSC convictions and nineteen to sixty years for the second-degree CSC conviction. Defendant appeals as of right. We affirm.

For many years, defendant played overnight host to children, primarily boys, of families he befriended through business dealings or otherwise. Defendant purchased gifts and items for the children, and allowed the boys who visited to do whatever they wanted, including smoking, drinking, and watching “R” rated movies or pornography. Defendant also allowed several boys to move into his home, and he introduced some of these boys as his own “sons” when identifying them to other people.

J.B.’s mother met defendant in 1992 through her nephew J.W., who lived with defendant. The mother believed that defendant was a nice person and, by the summer of 1992, she allowed

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<sup>1</sup> The court did not impose a sentence for the child sexually abusive material convictions.

J.B., who was twelve years old, to spend many nights at defendant's home. J.B.'s younger sister, H.B., also occasionally spent the night in defendant's home. J.B. testified that the defendant touched him and committed sexual acts on him numerous times. H.B. testified that she met defendant in 1992 when she was eight years old. During the Christmas season in 1994 or 1995, she stayed at defendant's house and slept in his bed. While she was in defendant's room, he convinced her that he was a doctor, had spoken to her mother, and needed to examine her vagina. After looking at her vagina, he informed her that it was dry. He rubbed lotion on it and put his fingers inside of it. On one other occasion, when H.B. was approximately nine years old and was in Canada with defendant, she testified that the defendant penetrated her vagina with his finger.

In November 2002, J.B. became a father and, at that time, he told his mother what had happened with defendant. His mother questioned H.B. about defendant, and H.B. revealed that defendant had also assaulted her. The police were contacted, defendant was arrested at his apartment on the same day that J.B. made his complaint to the police. Defendant denied touching either J.B. or H.B., but admitted to having children sleep in his bed because of his heart condition. Three computers were seized from defendant's apartment, along with a voice-changing device, a magic book, and 157 videotapes. Some of the videotapes were foreign films that depicted child nudity and erotica. More than one hundred individual images of children engaged in sexually abusive activity were found on the computers.

R.H. was also interviewed by the police in connection with defendant. He testified that he was seven years old when he met defendant, who had handled a mortgage for R.H.'s family. Defendant maintained a relationship with R.H.'s family and eventually became a father figure to R.H. Defendant told R.H.'s mother, that a demon was after R.H. R.H.'s mother was initially skeptical, however testimony elicited at trial indicates that defendant eventually convinced her that her son was cursed. Defendant also persuaded R.H.'s mother that he could protect R.H. by using his own blood to mark the child's abdomen. He performed this ritual on R.H. numerous times. R.H. testified that defendant also put his mouth on R.H.'s penis and grabbed R.H.'s testicles on many occasions. Defendant told R.H. that the oral pleasure would keep him safe from demons.

At trial, defendant denied sexually assaulting any of the three victims or the other witnesses. He claimed that J.B. and H.B. had conspired against him to bring the charges after he kicked their cousin, J.W., out of his home. Defendant also asserted that he had pornography on his computers because he was working to provide authorities, including the Federal Bureau of Investigation (FBI), with information about internet pornography.

## I

Defendant challenges the admission of similar-acts evidence under MRE 404(b). He argues that the testimony of two minor children regarding uncharged acts perpetrated upon them should not have been admitted without a hearing to determine admissibility. He also argues that the prosecutor did not establish a "proper" purpose for the admission of the evidence. This issue is not preserved because it was never raised before, or decided by, the trial court. Unpreserved issues, constitutional and nonconstitutional, are generally reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Here, however, while defendant outlines the challenged testimony, he fails to explain or

rationalize why the challenged evidence violated MRE 404(b). He also fails to explain, rationalize, or cite authority to support his claim that the trial court should have held a hearing before permitting the MRE 404(b) evidence. A defendant may not simply present his issues and leave it to this Court to discover and rationalize the basis for them. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, in considering defendant's unpreserved claims, we find that the evidence in this case was offered for at least one proper purpose, which was to show a common plan, system, or scheme. MRE 404(b). Moreover, it was relevant. Defendant befriended the families of the children whom he assaulted, gained the trust of the families and the children, allowed the prepubescent children to sleep in his home, purchased items and gifts for them, and convinced them to willingly permit the acts of sexual assault. There is "such a concurrence of common features" between the charged and uncharged acts that the charged acts are "naturally to be explained as caused by a general plan of which they are individual manifestations." *People v Katt*, 248 Mich App 282, 306; 639 NW2d 815 (2001). Further, the danger of unfair prejudice did not substantially outweigh the highly probative value of this evidence. MRE 403.

## II

Defendant next argues that he is entitled to a new trial because the trial court failed to exclude testimony about non-pornographic items recovered from his computer, specifically "bits of data and photographs" and "names of bulletin boards and websites," which were accessed by defendant. Defendant's sole argument on appeal is that the "bulk of information served only to confuse the jury," which was called upon to determine if the photographs admitted at trial constituted child sexually abusive material. Defendant's vague argument is insufficient to properly present this issue for our review. A defendant may not announce a position and leave it to this Court to explain or rationalize that position, nor may he provide only cursory treatment with little or no citation to authority. *Kelly, supra*.

Nevertheless, we note that defendant never objected to the testimony or evidence now challenged on appeal.<sup>2</sup> We review unpreserved issues for plain error affecting a defendant's substantial rights. *Carines, supra*. Defendant was charged with possession of child sexually abusive material. He maintained that he was accessing information and frequently visiting message boards, involving relationships with children, in order to assist the FBI in fighting child pornography. Two agents from the FBI disputed that defendant worked for the FBI as an informant or provided verifiable or reliable information. Defendant's computer activities, including the timing of his access to message boards and the downloading of images of children, was relevant to rebut defendant's claim that he was accessing pornography to assist law enforcement. It was also relevant to demonstrate his intent with respect to his possession of

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<sup>2</sup> During his testimony, the computer expert referred to a disc and "web page" that he created after examining defendant's computers. The expert testified that everything on the disc was a direct and exact duplicate of information found on defendant's computer. However, the expert actually categorized some of the data under a heading entitled "possible victims." Defendant objected, arguing that "possible victims" were irrelevant to the case. The objection was related to the labeling of information under the heading of "possible victims." The trial court admitted the evidence but deleted the reference to "possible victims." (Tr II, pp 232, 237, 240-242.)

child sexually abusive material. MRE 401; MRE 402. Defendant has not demonstrated that the admission of the challenged evidence of his computer activities constituted plain error. *Carines, supra*.

### III

Defendant next argues that the trial court abused its discretion when it failed to sua sponte strike the prosecutor's questions about religion, and by failing to give a corresponding curative instruction. Again, this issue is not preserved because it was never raised before, or decided by, the trial court. Our review therefore is for plain error. *Id.*

The prosecutor briefly questioned the mother of R.H. about her religion and elicited testimony that she was a Baptist, but that she was also a Native American and superstitious by nature. The testimony was designed to explain to the jury why the mother would allow defendant to perform ritual acts on her minor son. We agree with defendant that a prosecutor may not inquire into the religious beliefs of a witness. MCL 600.1436; MRE 610; *People v Leshaj*, 249 Mich App 417, 420; 641 NW2d 872 (2002). Nevertheless, this rule of law does not require reversal in this case. In *People v McLaughlin*, 258 Mich App 635, 660-661; 672 NW2d 860 (2003), the prosecutor questioned a defense witness about whether he believed in God and believed in doing "the right thing." He inquired about the attributes of "spiritual" people. *Id.* Because the challenged questions were not directed at the defendant's beliefs or behavior, however, this Court determined that the improper questioning of the witness did not affect the defendant's substantial rights. *Id.* at 663-664. The witness was a "relatively" unimportant witness, who was called only to testify that he knew the defendant through church activities and that he did not think the defendant was violent. *Id.* at 664. "In the broader context of the entire trial, the questions regarding [the witness'] religious opinions were a minor incident in the examination of a minor witness, and were too insignificant to deprive defendant of a fair trial." *Id.* We similarly find that in this case the witness was relatively unimportant and that her religious opinions were a minor incident in the examination of the witness. Therefore, the challenged evidence did not constitute plain error affecting defendant's substantial rights. *Carines, supra*.

### IV

Defendant also argues that the trial court abused its discretion when it failed to sua sponte suspend trial and hold a suppression hearing after defects in a search warrant were exposed during trial. This issue is not preserved, and defendant admits that it is being raised for the first time on appeal. Therefore, our review is for plain error. *Carines, supra*.

At trial, Deputy Ross testified that he believed he obtained the search warrant for defendant's residence at approximately 8:00 p.m. and that the warrant was executed between 8:30 and 9:00 p.m. on the night of defendant's arrest. When defense counsel showed Deputy Ross evidence that the signed warrant was not faxed to him until 10:45 p.m., Deputy Ross testified that he was mistaken about the time of 8:30 or 9:00 p.m. as the time the warrant was executed. He was positive, however, that he had the warrant in his hands when he went to defendant's apartment. While defendant argues that the trial court should have stopped the proceedings and held a suppression hearing in light of Deputy Ross' testimony, he cites no relevant authority to support this assertion. More importantly, nothing in the record supports that

a suppression hearing was warranted. Deputy Ross was questioned about the relevant issue and maintained that he was merely mistaken about the time of the search. He was positive that, at the time of the search, he had a valid, signed warrant in his possession. Defendant has not identified any evidence to rebut Deputy Ross' testimony. Accordingly, we find no plain error in the trial court's failure to sua sponte suspend trial and hold a suppression hearing. *Carines, supra*. Additionally, even if defendant could support his claim that the search took place before the warrant was signed and returned to Deputy Ross, the inevitable discovery doctrine would bar suppression of the evidence obtained in the search. *People v Brzezinski*, 243 Mich App 431, 435-436; 622 NW2d 528 (2000) (evidence obtained in violation of the constitution may be admitted at trial if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means).

## V

Defendant also raises numerous issues concerning the effective assistance of his counsel. Our review of these claims is limited to errors apparent on the record because no *Ginther*<sup>3</sup> hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant first argues that counsel failed to reveal a conflict of interest. He alleges that his counsel's wife was the supervisor of one of the "key" prosecution witnesses. A conflict is never presumed or implied. See *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). Rather, a defendant has the burden of establishing a prima facie case of ineffective assistance of counsel by demonstrating the existence of an actual conflict that adversely affected the adequacy of his representation. *Id.*, citing *Cuylar v Sullivan*, 446 US 335, 348-350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). "To warrant reversal, prejudice must be actual, not merely speculative." *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983). See also *People v Clark*, 133 Mich App 619, 629; 350 NW2d 754 (1983). In this case, defendant offers no evidence, other than his self-serving affidavit, to support his contention that his counsel's wife supervised the witness or that counsel knew of any potential conflict in his representation. Moreover, even if his counsel's wife supervised the witness at work, defendant has not demonstrated any prejudice. Contrary to defendant's assertion on appeal, the witness was not a "key" witness for the prosecution, and the witness' brief testimony was not necessary to establish the elements of any of the charged crimes. Accordingly, we find no reversible error.

Defendant next argues that counsel failed to use prior inconsistent statements made by the alleged victims to impeach those victims at trial. Decisions with respect to the presentation

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<sup>3</sup> *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

of evidence and questioning of witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not substitute our judgment for that of counsel regarding trial strategy. *Id.* More importantly, a convicted person who attacks the adequacy of his representation must provide the factual predicate for his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not done so in this case. He fails to identify any specific, prior inconsistent statements that may have been used to impeach the victims, and he fails to argue or demonstrate that any particular statements would have impeached the victims such that the outcome of the trial would have been affected. Defendant has not proven his claim of ineffective assistance of counsel. *Stanaway, supra.*

Defendant next argues that counsel failed to contact witnesses before trial. Again, defendant refers only to his self-serving affidavit to support his claim that counsel failed to contact witnesses. We note that defendant does not disclose the names of any potential witnesses who he believes should have been contacted, and he does not make any offer of proof with respect to the nature or substance of the alleged testimony that should have been obtained. Defendant has not established the factual predicate for his claim of ineffective assistance. Contrary to defendant's assertions, the record reveals that trial counsel called several witnesses on defendant's behalf at trial. Defendant has not met his burden to affirmatively demonstrate that counsel's performance was objectively unreasonable. *Stanaway, supra.*

Defendant next argues that counsel was ineffective for failing to object to the similar-acts testimony provided by R.T. and J.K. pursuant to MRE 404(b). Counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998). Defendant cannot demonstrate that a motion to preclude the challenged testimony would have been meritorious or that his counsel's failure to move to preclude the evidence fell below an objective standard of reasonableness. Indeed, as previously discussed, the challenged evidence was properly admitted. Under the circumstances, defendant cannot demonstrate that the outcome of trial was affected by counsel's failure to object to the challenged testimony. *Stanaway, supra.*

We also disagree that defense counsel was ineffective for failing to move to suppress evidence obtained from defendant's residence. In this case, Deputy David Ross was clear that he possessed a signed search warrant when the search of defendant's residence was conducted. Deputy Ross testified that he was mistaken about the time the search was conducted because he was sure he had a signed search warrant when he conducted the search. Furthermore, nothing in the record shows that defense counsel had any reason to move to suppress the seized evidence before trial because the discrepancy in the time of the search was not disclosed until Deputy Ross testified at trial. Defendant has failed to demonstrate that counsel was ineffective. *Stanaway, supra.*

We additionally find no merit to defendant's claim that counsel was ineffective for failing to impeach H.B. with evidence, specifically defendant's passport that allegedly proved defendant was out of the country in 1995 when H.B. claimed she was assaulted. The evidence at trial revealed that H.B. was unsure whether the charged conduct occurred in 1994 or 1995. Because she was unsure, the evidence of defendant's passport would not have been valuable impeachment evidence. It would simply have narrowed the time frame for the alleged act. We therefore conclude that counsel's conduct in failing to impeach H.B. with the passport was not objectively unreasonable. *Id.*

Defendant next makes the cursory argument that counsel was ineffective for failing to obtain medical records “which could have been used at trial to impeach the alleged victims.” Defendant fails to explain or rationalize why or how any medical records could have been used to impeach the victims. He has not met his burden of demonstrating that counsel was ineffective. *Stanaway, supra; Pickens, supra.*

With respect to several of his ineffective assistance of counsel claims, defendant argues that a remand for an evidentiary hearing is warranted to enable him to explore his claims. We disagree. This Court previously denied defendant’s motion to remand for an evidentiary hearing for failure to persuade that a remand was necessary at that time. In his brief on appeal, defendant fails to argue or support his claim that relevant, objective, and verifiable facts helpful to proving his claims would be obtained at an evidentiary hearing. A remand is warranted where a defendant shows a factual dispute or an area in which further elucidation of facts may advance his position. *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995). Defendant’s vague, speculative assertions with respect to his counsel’s conduct do not warrant an evidentiary hearing.

Affirmed.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Stephen L. Borrello