

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY ADAMS,

Defendant-Appellant.

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UNPUBLISHED

January 24, 2008

No. 272751

Oakland Circuit Court

LC No. 05-201551-FH

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

I. Introduction

Following a jury trial, defendant was convicted of 13 counts of child sexually abusive activity (CSAA), MCL 750.145c(2), and two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a)(sexual penetration with a person between the ages of 13 and 16). Defendant was sentenced as a second habitual offender pursuant to MCL 769.10, to 106 to 360 months in prison for eight of his CSAA convictions, 118 to 360 months in prison for his remaining five CSAA convictions, and 118 to 270 months in prison for each of his CSC III convictions. He appeals as of right, and we affirm.

II. Analysis

Defendant first argues that the trial court erred when it failed to sua sponte instruct the jury “regarding addict testimony.” Since defendant failed to request an instruction on “addict testimony,” and furthermore, expressed satisfaction with the trial courts proposed and subsequent instructions to the jury, we hold that defendant has waived this issue.<sup>1</sup> See *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003) (holding that when defense counsel

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<sup>1</sup> We also reject defendant’s argument that the trial court erred when it failed to sua sponte rule that four female witnesses not be allowed to testify because they were “high” at the time that they testified. Defendant has offered no evidence in support of this unpreserved claim of error. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

expresses satisfaction with the trial court's proposed and subsequent instructions to the jury, such approval constitutes a waiver that extinguishes any error regarding the instructions).<sup>2</sup>

Defendant next argues that his constitutional rights against ex post facto punishment were violated when he was convicted under the amended version of MCL 750.145c for alleged incidents that occurred before March 31, 2003. We disagree. The determination whether a charge is precluded by the constitutional prohibition against ex post facto laws presents a question of law that we review de novo. *People v Monaco*, 262 Mich App 596, 608; 686 NW2d 790 (2004), aff'd in part, rev'd in part on other grounds 474 Mich 48 (2006).

Ex post facto laws are prohibited by both the Michigan and federal constitutions. Const 1963, Art 1 Sec 10; US Const, Art 1 Sec 10; *People v Westman*, 262 Mich App 184, 186; 685 NW2d 423 (2004), overruled in part on other grounds *People v Monaco*, 474 Mich 48 (2006). An ex post facto law is one which: (1) makes an action done before the passing of the law, and which was innocent when done, criminal; (2) aggravates a crime, or makes it greater than it was, when committed; (3) changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony, than the law required to convict at the time of the commission of the offense. *People v Dolph-Hostetter*, 256 Mich App 587, 591-592; 664 NW2d 254 (2003). Defendant argues that the current version of MCL 750.145c (amended March 2003) is an illegal ex post facto law as applied to the alleged sexual incidents that occurred prior to the statute's amendment because the amended version adds the term "video," and thus, makes it easier to convict him of a violation of the statute for videotaping the complainants. The amended/current version of MCL 750.145c provides that child sexually abusive material consists of:

any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, *video*, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act. [(Emphasis added.)]

Whereas the 1978 version of MCL 750.145c that was in effect when the challenged acts occurred provided that child sexually abusive material consists of:

a developed or undeveloped photograph, film, slide, electronic visual image or sound recording of a child engaging in a listed sexual act.

We conclude that the addition of the term "video" is simply a clarification term expanding on the terminology "film," and "electronic visual image," which was added simply to keep up with technological advances. Defendant would still be convicted under the 1978 version of MCL 750.145c for making either films or electronic visual images of children engaging in sexual acts. Accordingly, the amended version of MCL 750.145c did not make it easier to convict defendant of a violation of the statute for videotaping the complainants, and therefore,

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<sup>2</sup> Whether defense counsel's aforementioned actions and inactions constitute a claim of ineffective assistance of counsel will be addressed *infra*.

defendant's rights against ex post facto punishment were not violated in this instance. *Dolph-Hostetter, supra* at 591-592.

Defendant next argues that the trial court erred when it found that he was a second habitual offender. We disagree. We review a trial court's decision to impose an increased sentence as authorized by the habitual offender act for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Before sentencing a defendant as a habitual offender, the existence of the defendant's prior convictions must be determined by the court at sentencing or at a separate hearing before sentencing. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998). The prior conviction may be established by any evidence that is relevant, including information contained in the presentence report. MCL 769.13(5); *Green, supra* at 699. In this case, the presentence report indicated that defendant was a habitual offender, and included details of the defendant's prior felony conviction, and therefore, defendant's prior conviction was established. MCL 769.13(5); *Green, supra* at 699.

When sentencing enhancement is authorized based upon the defendant's prior convictions, due process does not require that the prosecution separately charge the defendant as a second offender, nor is the defendant entitled to an adversarial proceeding before the prior convictions may be used. *People v Williams*, 215 Mich App 234, 235-236; 544 NW2d 480 (1996). Rather, due process is satisfied if the sentence is based upon accurate information and the defendant has a reasonable opportunity at sentencing to challenge the accuracy or constitutional validity of any prior convictions. *Id.* at 236. A "reasonable opportunity" allows a defendant the opportunity to deny, explain, or refute any evidence or information pertaining to his prior conviction(s) and allows him an opportunity to present relevant evidence. *People v Zinn*, 217 Mich App 340, 348; 551 NW2d 704 (1996). The court must resolve any of the defendant's challenges at sentencing or at a separate hearing. *Id.*

Before sentencing defendant, the trial court noted his status as a habitual offender. Defendant had an opportunity to challenge his prior conviction, and did so by arguing that his 1964 conviction was invalid because it stated that he spent a year and a half in prison for the conviction, yet was arrested on another offense within the preceding 18 months. The fact that the trial judge subsequently sentenced defendant as a habitual offender, evidently finding that defendant did not meet his burden of establishing that his prior conviction was invalid<sup>3</sup> and finding that defendant's conviction was based upon accurate information, does not invalidate the fact that defendant was given a "reasonable opportunity" to refute his prior conviction. *Zinn, supra* at 348. Defendant was therefore sufficiently declared to be a habitual offender, and the habitual offender proceedings properly protected defendants due process rights. *Green, supra* at

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<sup>3</sup> We note that the mere fact that defendant's PSIR stated that defendant was sentenced on September 4, 1964 to "three years prison," and according to defendant "served 1 ½ years, was paroled and successfully discharged," yet was arrested on October 17, 1965, does not invalidate defendant's 1964 conviction. Defendant's aforementioned conviction and subsequent arrest could merely have improper dates, or defendant may have been "paroled and successfully discharged," earlier than he recalled.

699; *Williams, supra* at 235-236. Accordingly, the trial court did not abuse its discretion when it sentenced defendant as a habitual offender.

Defendant next argues that the trial court violated his constitutional rights by failing to provide him with copies of his pretrial motion transcripts.<sup>4</sup> Defendant specifically contends that he sent a letter to the trial court requesting a copy of all of his transcripts, and that the trial court denied his request.

We agree with defendant's contention that an indigent defendant is entitled to all transcripts at public expense, and that if a defendant who is appealing as of right timely requests a transcript the court must order all of the requested transcripts. MCR 6.433; *People v Caston*, 228 Mich App 291, 294; 579 NW2d 368 (1998); *People v Arquette*, 202 Mich App 227, 230; 507 NW2d 824 (1993). However, defendant has not shown that the trial court denied his request for the transcripts in question. Defendant has merely established that his appellate counsel sent a conveniently undated letter to the trial court requesting specific transcripts on defendant's behalf so that the transcripts could be used to assist defendant in composing his standard 4 brief. In fact, the docket sheet reflects that the requested transcripts were filed, but that both defendant's request for the transcripts and the filing of the transcripts occurred after defendant had already filed his standard 4 brief.<sup>5</sup> Defendant cannot file his standard 4 brief containing an argument that he was improperly denied a non-existent request for transcripts, and then subsequently (approximately 35 days later) make a request for the transcripts in an effort to support an argument that he has already made. See *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001) (holding that a party cannot "harbor error as an appellate parachute."). We therefore conclude that defendant's argument in this regard fails.

Defendant next argues that MCL 750.145c(2) is unconstitutional, and therefore, he is entitled to dismissal of all of his CSAA convictions. Defendant argues that the statute is vague because it "lack[s] [a] description of what circumstances constitute a crime or what evidence under which there can be a conviction." We disagree. We review issues of federal constitutional law de novo. *People v Gatski*, 260 Mich App 360, 368; 677 NW2d 357 (2004).

"Statutes are presumed to be constitutional and are so construed unless their unconstitutionality is clearly and readily apparent." *People v Hill*, 269 Mich App 505, 525; 715 NW2d 301 (2006). A statute may be challenged for vagueness on the grounds that it (1) is overbroad and impinges on First Amendment rights, (2) does not provide fair notice of the proscribed conduct, and (3) is so indefinite that it confers unstructured and unlimited discretion on the fact-finder to determine whether the law was violated. *Id.* at 524.

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<sup>4</sup> Defendant's standard 4 brief, which makes specific record cites to various trial transcripts, and defendant's docket sheet reflect that defendant was provided with copies of his trial and sentencing transcripts.

<sup>5</sup> We note that our analysis of this issue was limited to the record before us. Defendant's blind unsupported contentions that he made several requests, which were denied, are simply not supported by the record.

Here, defendant's argument is directed at the requirement that a statute cannot be overbroad and impinge on First Amendment rights. Specifically, defendant claims that the statute violates his First Amendment rights because it is "overbroad to the extent it criminalizes the purely private taking and possession of sexually explicit photographs of [16 and 17] year olds who are above the age of consent to engage in sexual intercourse." The United States Supreme Court stated that "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," because "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of" children. *New York v Ferber*, 458 US 747, 757; 102 S Ct 3348; 73 L Ed 2d 1113 (1982). Accordingly, the United States Supreme Court has held that a definable class of material that "bears so heavily and pervasively on the welfare of children engaged in its production," is "without the First Amendment's protection," and therefore, states can constitutionally regulate such material as long the state adequately defines the prohibited conduct. *Id.* at 764.

MCL 750.145c provides that:

A person who persuades, induces, entices, coerces, causes, or knowingly allows a child<sup>6</sup> to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material,<sup>7</sup> or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than \$100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Here, in regard to defendant, the statute clearly states that an individual who produces or makes a video of a child engaging in a listed sexual act (sexual intercourse, erotic fondling, masturbation, passive sexual involvement, sexual excitement, or erotic nudity)<sup>8</sup> is guilty of a felony. MCL 750.145c. Given that states are allowed to regulate conduct that "bears so heavily and pervasively on the welfare of children engaged in its production," as long as the state adequately defines the prohibited conduct, as it did here, and that the statute in question was

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<sup>6</sup> The statute defines a "child" as "a person who is less than 18 years of age." MCL 750.145c(1)(b).

<sup>7</sup> The statute defines child sexually abusive material as "any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act." MCL 750.145c(1)(m).

<sup>8</sup> Erotic nudity is defined as "the lascivious exhibition of the genital, pubic, or rectal area of any person." MCL 750.145c(1)(g).

designed to protect “children from sexual exploitation, assaultive or otherwise,” *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994), it follows that defendant’s constitutional arguments do not hold muster. *Ferber, supra* at 757; *Hill, supra* at 524-525.<sup>9</sup>

Defendant next argues that the trial court erred when it granted the prosecutor’s motion to consolidate all of the charges against defendant for one trial. We disagree. We review de novo a trial court’s legal determination whether a single defendant’s offenses were related and therefore whether joinder of the offenses for trial is permissible under MCR 6.120(B). *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). We review a trial court’s ultimate decision to consolidate a case or deny a motion to sever joined cases for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120(B) provides:

On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant’s guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties’ resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties’ readiness for trial.

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<sup>9</sup> The fact that Michigan has chosen to allow individuals 16 years of age and older to engage in legal sexual intercourse is irrelevant. Defendant was not convicted for having intercourse with someone older than 16, he was convicted of CSAA. The Legislature is empowered to provide protections to 16 and 17 years old in regard to CSAA despite the fact that it has deemed them of age of consent to partake in sexual intercourse. Sexual intercourse and CSAA are two distinct areas. As noted by the United States Supreme Court, “pornography poses an even greater threat to the child victim than does sexual abuse or prostitution . . . because the child’s actions are reduced to a recording, [which] may haunt [the child] in future years, long after the original misdeed took place. *Ferber, supra* at 760, n 10.

MCR 6.120(C) provides:

On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).<sup>10]</sup>

Here, the trial court consolidated "all five cases into one trial" based on its finding that defendant's acts constituted "a part of a single plan or scheme." Joinder is allowed for offenses that are part of a single scheme, even if considerable time passes between them. *People v Tobey*, 401 Mich 141, 152 n 15; 257 NW2d 537 (1977). The evidence presented established that from 1998 to 2005, defendant lured various girls aged 14-17 into his house by allowing them to drink alcohol, smoke cigarettes, and ingest drugs at his house. It was further revealed that defendant would purchase the aforementioned illegal substances for the various underage girls, purchase cell phones for the girls, allow the girls to use his car, and give the girls cash in exchange for the girls allowing defendant to videotape them while they posed nude. Several of the underage girls also testified that defendant would give them extra money if they recruited new girls to come pose for him. We conclude that the evidence indicates that the acts committed against the individual complainants constitute "part of a single scheme or plan" on defendant's part to engage in an unbroken chain of sexually abusive activity with underage girls whenever the opportunity arose. Accordingly, we hold that joinder of the offenses was permissible under MCR 6.120(B). Moreover, given the convenience to the complainants of only having to testify once, the overall judicial economy of holding one trial instead of five, and the lack of prejudice toward defendant since all of the complainants' testimony would have been heard at each of his trials anyway as other act evidence, we further conclude that the trial court did not abuse its discretion when it subsequently denied defendant's motion to sever the trials. MCR 6.120; *Duranseau, supra* at 208.

Defendant next argues that there was insufficient evidence presented to support his CSAA convictions. Defendant specifically argues that the statute that he was convicted under requires the production of the alleged videotapes, and since no videotapes were produced there was insufficient evidence to convict him. We disagree. We review sufficiency of the evidence claims de novo, viewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing the evidence we must afford deference to the trier of facts special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Despite defendant's contention to the contrary, MCL 750.145c does not require that physical evidence (i.e. videotapes) of the illegal activity be produced. Instead, the statute merely requires a showing that defendant persuaded, induced, enticed, coerced, caused, or knowingly allowed an individual under the age of 18 to partake in a listed sexual act (erotic fondling or

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<sup>10</sup> Additionally, a trial court may also sever related offenses under its discretion, but is not required to do so. *Duranseau, supra* at 208.

erotic nudity) for the purpose of producing a video, knowing or having reason to know that the individual is under 18 years of age. MCL 750.145c.

As previously discussed, numerous underage girls testified that defendant induced, persuaded, enticed and coerced them into posing nude in erotic positions while defendant videotaped them. In fact, defendant himself testified that he knowingly videotaped underage girls posing naked, and admitted that the videos existed until he taped over and/or physically destroyed them. Accordingly, viewing the evidence presented in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of CSAA were proven beyond a reasonable doubt. MCL 750.145c. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

Defendant next argues that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to request a drug addict jury instruction, CJI2d 5.7. We disagree. When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel does not render ineffective assistance by failing to raise a futile objection, or by failing to make a futile motion, argument or request. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Hawthorne*, 265 Mich App 47, 57; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 174 (2006). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories, which are supported by the evidence. *Id.* Our Supreme Court has held that, upon request, a cautionary instruction regarding the credibility of narcotic addicts should be given to a jury. *People v Atkins*, 397 Mich 163, 170-171; 243 NW2d 292 (1976). However, this Court has held that an instruction regarding the special scrutiny that ought to be given to the testimony of an addict-informant should be given, on request, only where the testimony of the informant is the only evidence linking the defendant to the offense. *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999) rejected on other grounds by *People v Thompson*, 477 Mich 146 (2007); *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994).

First of all, although two girls testified that they took ecstasy on occasion, another girl stated that she was high on ecstasy when she posed for defendant, and two other girls testified that defendant would purchase marijuana for them, which may raise some suspicions regarding the witnesses past experimentation with illegal substances, it falls short of clearly indicating that the witnesses were drug addicts. The witnesses were also not by definition "informants."

Black's Law Dictionary, p 783 (Garner, 7<sup>th</sup> Ed.). Moreover, even if it were established that the aforementioned girls were drug addict informants, their respective testimony was corroborated by other witnesses, including defendant. Thus, the trial court was under no obligation to give the instruction had it been requested. *Griffen, supra* at 40; *McKenzie, supra* at 432. Defendant has not established that he was denied his constitutional right to the effective assistance of counsel. *Toma, supra* at 302-303; *Ish, supra* at 118-119.

We also reject defendant's argument that the prosecutor committed misconduct that denied defendant his right to a fair and impartial trial. Defendant failed to properly preserve his prosecutorial misconduct arguments for appeal by objecting to the prosecutor's alleged instances of misconduct on the same ground that he asserts on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for plain error. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

We reject defendant's argument that the prosecutor committed plain error meriting reversal when he elicited "perjured" testimony from a witness that "defendant was involved in drugs."<sup>11</sup> An attorney may not knowingly offer or attempt to elicit inadmissible evidence, *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986), but defendant has provided no evidence to support his allegation that the questioned testimony was perjured. Furthermore, the record establishes that the testimony is supported by various girls' testimony, and in part by defendant's own testimony. And, even if we were to conclude that it was impermissible for the prosecutor to elicit the aforementioned "drug" testimony, given the overwhelming evidence supporting defendant's CSC III and CSAA convictions, including defendant's own testimony,<sup>12</sup>

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<sup>11</sup> Defendant specifically takes issue with the following exchange:

Q Was Defendant's house a place where you could go and get alcohol and drugs whenever you wanted to?

A Yes. If you knew him. Yes.

Q And, was it a place that you could drink, where you could do the drugs at his house without getting in trouble?

A Yes.

Q Was it a place where you could go where the Defendant wasn't gonna call the police or wasn't gonna tell anybody about what you were doing?

A Yeah.

Q And, was it a place to go where young girls could go and do something and come out of there with money and drugs and all kinds of stuff like that?

A Yes.

<sup>12</sup> Defendant testified as follows:

(continued...)

we conclude that the actions did not amount to plain error meriting reversal. *Thomas, supra* at 453-454.

We likewise reject defendant's argument that the prosecutor committed plain error meriting reversal when, in closing, he referred to defendant as a "predator" and "manipulator." A prosecutor may not make a statement of fact unsupported by the evidence, but is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Here, the prosecutor's questioned remarks related to his theory of the case that defendant was a sexual predator who used drugs and money to manipulate underage girls to pose nude for defendant while he videotaped them in erotic positions. The prosecutor's theory was supported by the evidence, and his actions in this regard were therefore proper. *Schultz, supra* at 710. Moreover, as previously discussed, even if we were to conclude that the prosecutor's questioned actions were improper, given the overwhelming evidence given to support defendant's CSC III and CSAA convictions, including defendant's own testimony, we could not conclude that the actions amounted to plain error meriting reversal, and therefore, defendant's argument in this regard fails. *Thomas, supra* at 453-454.

We also reject defendant's argument that the prosecutor's alleged failure to provide defendant with requested discovery information that (1) a witness and her boyfriend thought defendant "turned in [the boyfriend]" and (2) that although the boyfriend was not prosecuted for CSC III (for impregnating his girlfriend before she was of age of consent) the prosecutor had requested a warrant to arrest him for CSC III, amounted to plain error requiring reversal.<sup>13</sup> Here,

(...continued)

Q Good afternoon, Mr. Adams. So, you took pictures of girls under the age of 18?

A Yes, I did.

Q Videos?

A Yes.

Q And, when you took these videos they were naked?

A Yes.

<sup>13</sup> A criminal defendant's due process rights to discovery are implicated if: (1) a prosecutor allows false testimony to stand uncorrected; (2) the defendant served a timely request on the prosecution and material evidence favorable to the accused was suppressed; or (3) the defendant made no request or only a general request for exculpatory information and the exculpatory information was suppressed. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). To establish that he was deprived of due process by the failure of the prosecutor to disclose exculpatory evidence, which includes impeachment evidence, a defendant must prove that the prosecutor possessed evidence favorable to the defendant, that the defendant did not possess it and could not have obtained it himself with reasonable diligence, that the prosecutor suppressed the evidence and that if the evidence had been disclosed to him there would have been a reasonable probability that the outcome of the proceedings would have been different. *People v*

(continued...)

defendant has failed to establish how disclosure of the aforementioned information would have affected the outcome of the proceedings, and therefore, defendant has failed to establish that the prosecutor's alleged failure to disclose the information violated his due process rights. See *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Accordingly, defendant has failed to establish plain error meriting reversal, and thus, his argument in this regard fails. *Thomas, supra* at 453-454.

Defendant next argues that he was denied his constitutional right to a speedy trial because he was incarcerated for 450 days before his trial started. During a motion hearing on October 19, 2005 (five days before defendant's trial was set to begin)<sup>14</sup> defendant confirmed that he was waiving his right to a speedy trial and his rights under the 180-day rule. Defendant has therefore waived any alleged violation of his aforementioned rights. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant's final argument on appeal is that he is entitled to resentencing because the trial court erred when it scored ten points for offense variable (OV) 4 and ten points for OV9. We disagree. Since defendant challenged the scoring of OV9 at sentencing, we review his challenge to the scoring of OV9 for an abuse of discretion. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, since defendant failed to challenge the scoring of OV4 at sentencing, in a proper motion for re-sentencing, or in a proper timely filed motion to remand filed in this Court, we review his challenge to the scoring of OV4 for plain error. *Kimble, supra* at 309; *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). We will uphold a scoring decision for which there is any evidence in support. *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

In pertinent part, under OV9, ten points should be scored if "2 to 9" people were "placed in danger of physical injury or death." MCL 777.39. We acknowledge that defendant was tried separately for crimes against each of the five complainants, and thus, the fact that the five complainants were placed in danger of injury on separate occasions is not by itself sufficient for ten points to be scored under OV9. However, in addition to testimony being presented that the five complainants were placed in danger of injury on separate occasions, the record provides ample testimony to support a scoring of ten points under OV9. Two witnesses, who were not complainants, both testified that defendant videotaped them posing nude together, which defendant confirmed. Furthermore, one complainant testified that on one occasion defendant videotaped her posing nude with her non-complainant friend, which defendant also confirmed. Accordingly, there is ample evidence in the record to support the trial court's scoring decision that 2 to 9 individuals were placed in danger of injury, and therefore, the trial court did not abuse its discretion when it scored ten points under OV9. *Cox, supra* at 454.

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(...continued)

*Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998).

<sup>14</sup> It should be noted that defendant's trial date had already been pushed back at this point in time because the trial court honored defendant's prior request that trial be adjourned for the appointment of a court appointed investigator.

In pertinent part, under OV4, ten points should be scored if a victim suffered serious psychological injury that “may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” MCL 777.34. Here, one complainant testified that she viewed the video of herself, which made her feel degraded, and furthermore, when asked how doing the videos affected her life, responded, “I don’t even know where to begin on that. That’s a whole other story.” The complainant additionally stated that defendant was the reason she “dropped out of high school, because everyone found out about everything. . . . [she] was so embarrassed [that she] dropped out of high school.” Another complainant, who watched the seconds tick off of a timer as defendant performed oral sex on her, testified that she eventually stopped talking to defendant because she felt “disgusted” with what she did. She was so embarrassed and affected by what she had did that she initially could not tell either of her counselors or the police about the incidents that took place between she and defendant, stating “I was gonna keep that a secret forever.” Finally, defendant’s PSIR<sup>15</sup> indicates that a complainant was a “straight A” student before meeting defendant and that the complainant informed the police that defendant “screwed up her life.” Defendant’s PSIR also indicated that a complainant informed the police “she felt her life was over, [and] stopped caring for people who cared about her.” Based on these statements and the overall nature of defendant’s actions in regard to numerous, vulnerable, underage girls, there is evidence in the record to support the trial court’s scoring decision that victims suffered serious psychological injury requiring professional treatment, and therefore, the trial court did not commit plain error when it scored ten points under OV4. *Cox, supra* at 454.

Affirmed.<sup>16</sup>

/s/ Christopher M. Murray  
/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder

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<sup>15</sup> Information contained in a PSIR can be used to score a defendant’s OV’s. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003).

<sup>16</sup> We note that we have declined to review defendant’s arguments regarding the issuance of an arrest warrant and an excessive bond. Defendant has provided no legal or factual support for either of the arguments, and therefore, has abandoned both arguments. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).