

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 25, 2011

v

WILLIAM WHITNEY,
Defendant-Appellant.

No. 294760
Wayne Circuit Court
LC No. 09-014455 - 01

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c) (sexual penetration with knowledge that the victim was physically helpless). Defendant was charged with engaging in two separate acts of penetration, Count I (cunilingus) and Count II (penis penetration), on the complainant, whom he had reason to know was physically helpless. Defendant was sentenced to 10 to 15 years' imprisonment for each count. We affirm defendant's conviction of Count I, but reverse his conviction of Count II, and remand the case to the trial court to determine whether resentencing is required.

I. HEARSAY

Defendant first argues that the testimony of one of the officers regarding what his partner told him that defendant said in text messages to the complainant constituted hearsay included within hearsay. Specifically, when asked at trial what the text messages said, the officer explained that, based on what he heard his partner say, defendant was trying to apologize to the complainant in the text messages. According to defendant, the text messages constituted one layer of hearsay, and the officer's partner repeating the same constituted a second layer. We review a trial court's ruling to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Where a trial court's decision is within the principled range of outcomes, no abuse of discretion will be found, and the reviewing court may properly defer to the trial court's judgment. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007); MRE 801(c). "Where multiple levels of hearsay are involved, all declarations made must not be hearsay or must fall within a recognized exception." *People v Mesik*, 285 Mich App 535, 538; 775 NW2d 857 (2009); MRE 805.

With respect to the text messages themselves, we find that these statements constitute a party admission under MRE 801(d)(2)(A), and therefore are not hearsay. *Maiden v Rozwood*, 461 Mich 109, 125 n 8; 597 NW2d 817 (1999). Defendant’s hearsay within hearsay argument is consequently baseless. The statement of the testifying officer’s partner concerning the substance of these messages, however, was unsworn, made out-of-court, and offered for its truth. It therefore constitutes hearsay by definition and is inadmissible since it failed to satisfy any of the relevant hearsay exceptions. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); MRE 802.¹

Regardless, defendant has not shown error requiring reversal. Under the harmless error standard, reversal is proper only where the defendant shows that the error resulted in prejudice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). In approaching this inquiry, “the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *Id.* Here, the complainant testified that defendant sent her text messages begging her not to tell the police, and explaining that he had just tried to show her a good time. Another witness confirmed that she saw the text messages. Therefore, the jury heard testimony regarding the content and existence of the text messages from sources other than the officer. Further, the after the fact text messages between the victim and defendant were not the only indication of what occurred, as the jury had the complainant’s testimony describing the unwelcomed sexual acts that transpired. Accordingly, it cannot be said that it is more probable than not that a different outcome would have resulted absent the alleged error, and any error in allowing the officer to testify in the way that he did was harmless.

Defendant also challenges the foregoing testimony on Confrontation Clause grounds. This issue is not properly preserved, so our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We may properly reverse only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant’s innocence. *Id.*

Criminal defendants have a state and federal constitutional right to be confronted with the witnesses against them. US Const, Am VI; Const 1963, art 1, § 20; *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). “The Confrontation Clause prohibits the admission of all out-of-

¹ We reject the prosecution’s claim that the partner’s statement qualifies as a present sense impression under MRE 803. Indeed, that rule requires that the declarant personally perceive and contemporaneously describe *an event*. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998). It is dubious, however, whether a statement may be considered an event or condition within the meaning of this hearsay exception. See, e.g., *State v Stevens*, 171 Wis 2d 106, 119; 490 NW2d 753 (1992) (holding that the present sense impression exception is inapplicable to the aural perception of privately revealed oral statements). In any event, the partner’s statement regarding the text messages failed to satisfy the condition that the declarant’s statement be “substantially contemporaneous” with the event to qualify for admissibility under MRE 803. *Hendrickson*, 459 Mich at 236. The admission of the statement at issue was improper.

court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination.” *Chambers*, 277 Mich App at 10. Statements made during a police interrogation are testimonial where the circumstances objectively indicate that the investigation’s primary purpose is to establish past events potentially relevant to a later criminal prosecution, and not to meet an ongoing emergency. *People v Bryant*, 483 Mich 132, 139; 768 NW2d 65 (2009), cert gtd __US__; 130 S Ct 1685; 176 L Ed 2d 179 (2010).

Notably, the Confrontation Clause bars the admission of testimonial statements, first, only if the statements constitute hearsay. *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009). With respect to the text messages, these out-of-court statements fell under the party admission exclusion from the hearsay definition, and the Confrontation Clause is inapplicable. With respect to the recitation of the text messages by the officer’s partner, however, this out-of-court statement constituted hearsay. The admission of testimonial hearsay violates the Confrontation Clause unless the declarant is unavailable and defendant had a prior opportunity to cross-examine him. *Crawford v Washington*, 541 US 36, 61-62; 124 S Ct 1354; 158 L Ed 2d 177 (2004). As the Supreme Court explained in *Crawford*:

[T]he [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. [*Id.*]

Here, the partner’s statement was testimonial in nature because the alleged criminal sexual conduct had already occurred and the officers were attempting to establish the true nature of those past events. Further, no evidence exists to suggest the partner’s unavailability, and defendant had no prior opportunity for cross-examination. Accordingly, the testimony violated the Confrontation Clause. Nonetheless, given the analysis above, this constitutional error did not affect defendant’s substantial rights.

II. JURY INSTRUCTIONS

Defendant next argues that a new trial is warranted because the trial court defined the term “physically helpless” to the jury, when the charge in the Information used the term “incapacitated.” He also argues that the trial court erred when it failed to read the jury instructions pertaining to each count of CSC III separately, which resulted in confusion and misunderstanding. A party expressing satisfaction with the jury instructions, however, waives his or her right to appeal the alleged instructional error. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). Here, at the conclusion of the jury instructions, the trial judge asked if the parties were satisfied with them, and defense counsel responded that he was.

Because defendant waived, as opposed to merely forfeited, his right to appellate review regarding the alleged instructional errors, we decline to review them. *Carter*, 462 Mich at 219.²

III. CONFLICT OF INTEREST

The probation officer who approved defendant's presentence report is the complainant's aunt. Neither defendant nor defense counsel knew of this conflict at the time of sentencing. Defendant argues that this revelation entitles him to a new trial because the instance of impropriety tainted the entire proceeding, depriving him of his constitutional right to due process.

This issue is not properly preserved, so our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763. Thus, we may properly reverse only where the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Id.*

We fail to understand the basis for defendant's assertion that a new trial is the proper form of relief in this case, as the jury was never privy to the presentence report and convicted defendant based on the evidence introduced at trial. For this reason, the authority that defendant cites regarding a criminal defendant's right to impartiality during trial, as well as prosecutorial conflicts of interest, are inapposite.

Although this Court has not had opportunity to review a situation of this kind, several United States Courts of Appeal have addressed arguments involving alleged impropriety on the part of probation officers. In those cases, the courts have relied heavily on the integrity of trial court judges, who are the ones who actually render the sentences. See, e.g., *United States v Espalin*, 350 F3d 488, 489 (CA 6, 2003) and *United States v Johnson*, 935 F2d 47, 51 (CA 4, 1991). Additionally, when there is some form of conflict, resentencing will not occur unless defendant can establish prejudice. *United States v Morris*, 76 F3d 171, 176 (CA 7, 1996).

Here, we have little trouble finding that the probation officer's relationship to the complainant constitutes a conflict of interest. That the probation officer neglected to disclose the conflict is disturbing; as the complainant's aunt, her interests undoubtedly aligned with the prosecution. *Morris*, 76 F3d at 176. Nonetheless, defendant does not argue that the impropriety caused the trial judge to make a sentencing error, much less one that requires reversal, and there is no indication that the trial judge, in fact, abdicated his decisional role by simply rubber-stamping the probation officer's recommendation. *Espalin*, 350 F3d at 489-490. Moreover, in his brief, defendant does not specify how he has been prejudiced, nor does he argue that his sentence would have been different absent the impropriety. As is typically the case, the trial judge went through the various scoring variables, asked the parties if they had any objections, and sentenced defendant within the

² In any event, defendant was provided due notice of the charges because the Information repeatedly stated the victim was "physically helpless." Only the title of the Information contained the phrase "mentally incapacitated."

appropriate guidelines range. Accordingly, on this ground, defendant has not shown cause for resentencing.

IV. SCORING VARIABLES AND PROPORTIONALITY

Defendant next argues that he is entitled to resentencing because the trial court misscored PRV 7 and OV 11, and because his sentence is disproportionate to the offense, amounting to cruel and unusual punishment. Defendant waived his right to challenge the scoring of PRV 7 and OV 11 on appeal because, at sentencing, defense counsel indicated that he had no objection to the scoring of the variables or would leave the scoring determinations to the trial court's discretion. *Carter*, 462 Mich at 219. Having waived his rights, there are no "errors" to review. *Id.*

Defendant's remaining constitutional challenge is not properly preserved. We review unpreserved claims that a sentence is disproportionate or constitutes cruel and unusual punishment for a plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003).

Imposing a sentence within the guidelines ranges is presumptively proportionate, and a proportionate sentence does not constitute cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A sentence is constitutionally proportionate if it is tailored to a defendant's personal responsibility and moral guilt. *People v Bullock*, 440 Mich 15, 39; 485 NW2d 866 (1992).

Here, the trial court imposed a sentence within the guidelines range, 72 to 120 months, and defendant must overcome the presumption of proportionality. Defendant argues that a 120-month sentence is disproportionately severe because the circumstances created a scene set for sexual activity and the guidelines fail to account for the complainant's irresponsible behavior. We reject defendant's argument that the complainant's irresponsibility in getting into the situation that lead to the rape makes defendant's decision to rape her while incapacitated less offensive such that punishing him in accordance with the guidelines range would be disproportionate. Both parties drank excessively on the evening in question, but only defendant engaged in criminal sexual conduct. Accordingly, we find that defendant's sentence did not constitute cruel or unusual punishment, and resentencing is unwarranted on this ground.

V. PROSECUTORIAL MISCONDUCT

Defendant also argues that the prosecution's use of the terms "disgusting" and "gross" during opening statement, cross-examination of defendant, and closing argument denigrated the defense, entitling him to a new trial. We disagree. Because this claim is not properly preserved, our review is limited to plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Prosecutors have the authority to argue the evidence and all reasonable inferences derived from that evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "[A] prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). For claims of prosecutorial misconduct, the question for the court is whether the prosecution's statements had the effect to deny the defendant a

fair trial. *Bahoda*, 448 Mich at 263. Prosecutors may not, however, suggest to the jury that defense counsel is intentionally attempting to mislead them or otherwise denigrate the defense's theory of the case. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

The first alleged impropriety occurred during the prosecution's opening statement. Anticipating the complainant's trial testimony, the prosecution explained, "[the complainant] literally grabs a hold of his penis from behind her and pulls him out of her. She indicates that she rubs her hands down on her pants because they are literally covered in blood. How disgusting, how gross." We find that this statement does not mischaracterize the complainant's anticipated testimony. Further, the prosecution did not direct the remark at defendant, nor did she set out to cast defendant in a negative light.

Defendant also challenges testimony offered during defendant's cross-examination. The prosecution asked whether defendant had testified that his sister was not dancing on the evening in question. Defendant responded that his sister was dancing, and clarified that his sister was not dancing *on him*—the complainant was the only individual dancing on him. The prosecution then stated, "Why in the world would your sister ever dance on you, sir? That's disgusting." Defendant agreed. Viewing this statement in context, the prosecution did not refer to defendant or defendant's answer as disgusting. Instead, the prosecution merely referred to the idea of defendant's sister dancing on him as disgusting, and defendant shared this sentiment. The prosecution never contended that defendant's sister danced on him, nor could the jury have believed this to be the case based on the testimony.

Finally, defendant challenges the prosecution's following remarks during closing argument:

Think about what [the complainant] has gone through since the beginning of this case. She has had to talk about some of the most disgusting things a person can ever have happen to them. She's had to come into a courtroom full of people that she doesn't know from the community and discuss the most personal and private and intimate details of her life. And they're not exactly pretty or romanticized. They deal with puke and blood. It's disgusting. There is no reason whatsoever why she would continue to tell this story over and over and over again unless it's what really happened to her.

As with the remark during the prosecution's opening statement, it is simply not a mischaracterization to refer to the details of the alleged sexual assault as disgusting. The prosecution was careful, in fact, not to refer to defendant as a disgusting person, but only to describe the details of the assault as disgusting.

Moreover, the prosecutor acted within her authority when she offered an explanation to the jury for why the complainant had no motive to lie. Prosecutors may vouch for witnesses' credibility so long as they do not imply that they have special knowledge or support their voucher with the authority or prestige of the prosecutor's office. *Bahoda*, 448 Mich at 276; *People v Smith*, 158 Mich App 220, 232; 405 NW2d 156 (1987). A prosecutor does not imply that he or she has special knowledge simply by arguing that a witness has no reason to lie. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). It is particularly appropriate to comment on a witness's credibility during closing argument where, as here, there is conflicting testimony and the defendant's guilt

depends on whose story the jury believes. *Id.* Further, even if some degree of impropriety had occurred, “the judge’s instruction that arguments of attorneys are not evidence dispelled any prejudice.” *Bahoda*, 448 Mich at 281.

In sum, a new trial is unwarranted on the basis of prosecutorial misconduct because the prosecution’s use of the words “disgusting” and “gross” at various points during the trial fairly characterized the nature of the sexual assault, did not assert facts not in evidence, and provided a legitimate reason to find the complainant’s testimony credible.

VI. INSUFFICIENT EVIDENCE OR VERDICT AGAINST THE GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that the prosecution failed to prove defendant’s guilt beyond a reasonable doubt with respect to either CSC III count. We review the record regarding a claim alleging insufficient evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We determine whether the evidence presented at trial, when viewed in the light most favorable to the prosecution, was sufficient to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The pertinent statute, MCL 750.520d(1)(c), provides that a person is guilty of criminal sexual conduct in the third degree if he engages in penetration of another person whom he knew or had reason to know was mentally incapable, mentally incapacitated, or physically helpless. *People v Breck*, 230 Mich App 450, 451; 584 NW2d 602 (1998). “Physically helpless,” the term defined to the jury, “means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.” MCL 750.520a(i); *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988).

Defendant argues that it defies logic to find the testimony of a physically helpless individual credible. We disagree. Although defendant began performing oral sex on the complainant while she slept, she awoke during the process. Certainly, the complainant could testify regarding what she saw and felt once she was awake. To the extent that defendant otherwise argues that the complainant’s testimony was not worthy of credence, the question of credibility ordinarily should be left for the factfinder, and the evidence was not insufficient on this basis. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Nonetheless, as the prosecution concedes, insufficient evidence existed to support defendant’s conviction of Count II (penis penetration). A CSC III claim is made out in cases where, for example, the defendant knowingly penetrates a sleeping victim, who awakens during the process of being penetrated. *Perry*, 172 Mich App at 622. No such claim exists, however, where the victim is awake when the defendant penetrates her and is capable of communicating her unwillingness to engage in the sexual act. *Id.* As this Court reasoned in *Perry*:

While the victim was asleep when defendant entered the home, defendant woke her and then took her in the bathroom where the sexual assault occurred. We agree with defendant that the essence of physical helplessness is that the victim is unable to communicate unwillingness to an act. Such is the case when the victim is asleep or unconscious. Here, the victim was awake when the assault

occurred and could physically communicate her unwillingness to the act. We note that a different result would follow if the victim had been penetrated by defendant while asleep or had awakened during that process. [*Id.*]

Here, with respect to Count I (cunnilingus), the prosecution presented sufficient evidence that defendant knowingly penetrated a physically helpless victim. The definitional statute, MCL 750.520a(p), includes “cunnilingus” among the types of sexual penetrations that may form the basis of a CSC charge. *People v Nyx*, 479 Mich 112, 163-164; 734 NW2d 548 (2007) (CORRIGAN, J., dissenting). Viewing the evidence in the light most favorable to the prosecution, defendant performed oral sex on the complainant while she slept, he knew that she was asleep, and the complainant awoke during, rather than before, the sexual act. By contrast, with respect to Count II (penis penetration), a reasonable jury could not find that defendant penetrated a physically helpless victim as defined by statute. MCL 750.520a(1). Viewing the evidence in the light most favorable to the prosecution, the complainant was awake at the time defendant inserted his penis into her vagina. By this point, she had already communicated to defendant her unwillingness to engage in sexual acts, and had physically resisted his advances. Thus, as the prosecution concedes on appeal, there was insufficient evidence presented to the jury to convict defendant under Count II.

Defendant also argues that defendant’s convictions are against the great weight of the evidence. We review for an abuse of discretion a trial court’s decision on a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). “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).

A verdict is against the great weight of the evidence when “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). For the same reasons outlined above, we find that defendant’s conviction of Count II was against the great weight of the evidence and cannot stand. With respect to Count I, however, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand.

VII. INEFFECTIVE ASSISTANCE

Whether a defendant received effective assistance from his trial counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error and questions of constitutional law de novo. *Id.* In reviewing an ineffective assistance of counsel claim, “[a] judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *Id.* Because defendant failed to preserve this issue for appellate review, however, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In *People v Pickens*, 446 Mich 298, 308-327; 521 NW2d 797 (1994), the Michigan Supreme Court adopted the federal standard for ineffective assistance of counsel set forth in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), for which the defendant must establish two requirements. First, the defendant must show that he received deficient assistance from

counsel, meaning that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, the defendant must show that counsel's deficient performance resulted in prejudice, meaning that, but for counsel's errors, a reasonable probability exists that a different outcome would have resulted. *Id.* at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Defendant first argues that counsel's failure to object to hearsay testimony from the complainant's mother denied him effective assistance. The complainant's mother testified that the complainant, in a phone conversation, told her that defendant raped her. We agree with defendant that the mother's testimony constitutes hearsay, as the prosecution offered it for the truth of the matter asserted in the complainant's out of court statement—i.e., that defendant raped her. MRE 801(c). Yet we find that the statement qualifies as an excited utterance, admissible as an exception to the hearsay rule. MRE 803(2). The exception provides that, although hearsay, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an exception to the hearsay rule. *Id.*; *People v Barrett*, 480 Mich 125, 131; 747 NW2d 797 (2008).

Whether a statement satisfies the timeliness requirement depends on whether the declarant made the statement before she had time to contrive and misrepresent. *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). "Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive[,] and a court should consider possible explanations for the lapse of time. *Id.* at 551. In *Smith*, for example, the complainant remained under the stress of the sexual assault when he broke down in tears ten hours later and explained to his mother what happened. *Id.* at 552-554. In fact, a victim has been found to remain under the stress of a sexual assault for as long as one month. *People v Straight*, 430 Mich 418, 421; 424 NW2d 257 (1988).

Here, rape unquestionably qualifies as a startling event. *Smith*, 456 Mich at 552. Further, although a closer case, we find that the complainant remained under the stress of the sexual assault the next day, still crying and noticeably upset, when she relayed to her mother what happened. The complainant arrived home after the alleged sexual assault scared and drunk. According to the complainant, she did not sleep, but cried the entire night. Although many hours had lapsed, we find that the stress arising from the sexual assault had not yet abated. Because we find that the challenged testimony falls under an exception to the hearsay rule, defense counsel's failure to make a meritless objection to the testimony did not deny defendant the effective assistance of counsel. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant next argues that he received ineffective assistance because defense counsel permitted the complainant to testify in long narratives. As this Court stated in *People v Wilson*, 119 Mich App 606, 617; 326 NW2d 576 (1982), however, "[n]othing in the rule specifically precludes testimony because of its narrative form," and "[i]t rests within the sound discretion of the trial judge

to determine whether a witness will be required to testify by question and answer or will be permitted to testify in narrative form.” Accordingly, defense counsel did not err in this regard.³

Finally, defendant argues that defense counsel’s failure to exercise peremptory challenges to remove jurors who indicated that they had close friends and family members who were victims of criminal sexual assaults denied him effective assistance. We disagree. “[A]n attorney’s decisions relating to the selection of jurors generally involve matters of trial strategy.” *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Counsel’s chosen trial strategy is presumed sound. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Further, this Court has been reluctant to find ineffective assistance on the basis of jury selection given the importance of the jurors’ facial expressions, body language, and manner of answering questions. *Unger*, 278 Mich App at 258. Here, this Court did not observe the jurors or hear their responses during voir dire. *Id.* We simply cannot say that defense counsel’s decision not to exercise peremptory challenges fell below an objective standard of reasonableness given that all jurors indicated that they could be fair and not let the experiences of those close to them influence their decisions.

VIII. CONCLUSION

We affirm defendant’s conviction of Count I (cunnilingus), but reverse defendant’s conviction of Count II (penis penetration). We recognize that reversing defendant’s second conviction may affect the trial court’s sentencing decision. Accordingly, we remand to the trial court to determine whether it would impose a different sentence given the changed guidelines scoring, in which case it may enter an order granting resentencing. See *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994), overruled in part on other grounds *People v McGraw*, 484 Mich 120 (2009).

We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

³ Defendant also argues that defense counsel failed to object to the prosecution’s denigrating remarks. As discussed above, however, the challenged testimony did not denigrate the defense, and defense counsel has no obligation to make futile objections, *Rodriguez*, 212 Mich App at 356.