

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL MARCUS FLORES,

Defendant-Appellant.

UNPUBLISHED
November 19, 2013

No. 312613
Saginaw Circuit Court
LC No. 10-034524-FH

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii) (victim at least 13 but less than 16 years old and related to the defendant). The jury acquitted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b). The trial court sentenced defendant to concurrent sentences of 10 to 20 years. We affirm defendant's convictions but remand this case for resentencing.

I. BASIC FACTS

The victim, defendant's daughter, alleged that on two occasions in June 2006, before her 14th birthday, defendant penetrated her with his fingers and with his penis while she was staying with defendant at defendant's girlfriend's house. The victim initially disclosed the abuse to one of defendant's friends in an email. A few days later, she wrote two emails recanting the allegations. At trial she indicated that she recanted her allegations because defendant had called her and asked her to say she was lying so that he would not get in trouble. The victim testified that sometime after the incidents she told her mother and grandparents, but no one got her any help. Eventually, she told a school counselor about the abuse, and the counselor reported it to protective services, who became involved in 2007. The police set up a forensic interview, but the officer in charge indicated that from May 2007 until 2010, the police did not continue the investigation, ostensibly due to the sheer volume of cases on which the officer was working. Charges were brought against defendant in 2010 and he was tried and convicted in 2012. Defendant raises four points of error on appeal.

II. PREARREST DELAY

Defendant claims he was denied his constitutional right to due process because of prearrest delay. We disagree.

We review de novo whether prearrest delay deprived a criminal defendant of due process. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). We apply a balancing test “to determine if a prearrest delay requires reversing a defendant’s conviction” *Id.* at 108. The defendant bears the burden of coming forward with evidence of prejudice resulting from the delay. *Id.* “If a defendant demonstrates prejudice, the prosecution must then persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted.” *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009). In order to dismiss charges because of prearrest delay, “there must be actual and substantial prejudice to the defendant’s right to a fair trial and an intent by the prosecution to gain a tactical advantage.” *Id.* “Substantial prejudice is that which meaningfully impairs the defendant’s ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected.” *Id.* Moreover, “proof of ‘actual and substantial’ prejudice requires more than generalized allegations[.]” *People v Adams*, 232 Mich App 128, 135; 591 NW2d 44 (1998). “An unsupported statement of prejudice by defense counsel is not enough [to establish prejudice], nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death.” *People v Walker*, 276 Mich App 528, 546; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008) and overruled in part on other grounds by *People v Lown*, 488 Mich 242; 794 NW2d 9 (2011). In order to prove prejudice based on missing witnesses, the defendant must show that witnesses absent because of the delay “would have provided relevant information beneficial to [the] defense.” See *Adams*, 232 Mich App at 136.

Defendant claims he was prejudiced because the delay affected several witnesses’ memories, causing them to give conflicting accounts of defendant’s Chicago trip, which formed the basis of his alibi defense. However, simply claiming that witnesses have memory loss is not sufficient to show prejudice because a defendant must show that the alleged memory loss meaningfully impaired his “ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected.” See, generally, *Patton*, 285 Mich App at 237.¹

¹ During the October 17, 2011, dismissal hearing, defendant also claimed that the complainant’s friend’s memory regarding the victim’s retraction emails was likely affected. However, on appeal, he does not expressly argue that the friend’s possibly unreliable memory caused prejudice. Instead, he notes that it was one of the reasons he used to try and show prejudice in the trial court. To the extent that he is now asserting prejudice from the friend’s possibly unreliable memory, we do not find prejudice. The emails between the victim and her friend were presented to the jury and the victim did not dispute sending them. Thus, the potentially exculpatory evidence was clearly obtained through other means. See *Adams*, 232 Mich App at 136. We further note that Eliza Washington, whom defendant had argued at the hearing would likely be unavailable because of a terminal illness, provided evidence at trial by way of her deposition, and she testified that her condition did “not really” affect her memory.

In this case, certain alibi witnesses testified that they remembered that defendant's Chicago visit started in June, before the victim's birthday and the timeframe in which she alleged that the abuse occurred, and that defendant did not return until after the victim's birthday. Therefore, defendant was not prejudiced by the lapse in time between the alleged commission of the offense and his arrest because he still had witnesses who remembered his trip to Chicago and placed him out of the state when the alleged abuse occurred.

Defendant argues that he was prejudiced because, as of December 3, 2007, he was unable to obtain a copy of his Amtrak ticket from Chicago to Michigan.² However, three witnesses testified that defendant took the Amtrak from Chicago to Michigan, so the potentially exculpatory physical evidence was adequately presented at trial through other means, i.e., witness testimony. See *Adams*, 232 Mich App at 136. Finally, defendant argues that he was prejudiced because Rosemary Grandos had a stroke and Jose Garcia was incarcerated in federal prison. He indicated that both potential witnesses could have testified that defendant was in Chicago during the alleged sexual assault. However, as indicated *supra*, multiple witnesses did testify that defendant was in Chicago during the timeframe of the alleged sexual assaults, so there was no sufficient actual prejudice caused by the absence of these two witnesses. Therefore, we hold that defendant has failed to establish that he is entitled to relief because of prearrest delay.

III. SPEEDY TRIAL

Next, defendant argues that he was denied his right to a speedy trial. The record shows that defendant waived his right to a speedy trial early in the proceedings. "A defendant may not claim error regarding an issue on appeal where his lawyer deemed the action proper at trial or otherwise acquiesced." *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Appellate relief is unwarranted.³

IV. TESTIMONY OF EXPERT WITNESS

Next, defendant asserts that the prosecutor's expert witness improperly vouched for the credibility of the victim. We disagree. A trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *Dobek*, 274 Mich App at 71. Moreover, "[a]n expert may not vouch for the veracity of a victim." *Id.* In a childhood sexual-abuse case, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not

² At the hearing, defense counsel stated, "He returned from Chicago by train on July 2nd, but we could not get proof of his transportation"

³ We also note that defendant caused most of the delay in this case.

testify whether the defendant is guilty.” *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). However, “an expert may testify in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim” *Id.*

Unaided by expert testimony, a jury might reasonably believe that recantation by a victim would not occur unless the original allegations of abuse were false. Thus, expert testimony was permissible to demonstrate that there are multiple reasons that sexual-abuse victims may recant their allegations. See *id.* at 352. In this case, the hypothetical posed to the expert was properly designed to explain the victim’s specific behavior—her recantation—that might be incorrectly construed by the jury as inconsistent with actual abuse. Further, the testimony about whether children sometimes falsely recant their allegations was general in nature, and the expert did not opine whether the victim in this case had falsely recanted. In other words, the expert did not comment on the victim’s veracity or credibility. Moreover, we note that a prosecutor is allowed to “argue the reasonable inferences drawn from the expert’s testimony and compare the expert testimony to the facts of the case.” *Id.* at 373. We find no basis for reversal.⁴

V. SENTENCING

Finally, defendant argues that the trial court erred in scoring offense variables (OVs) 3 and 11 of the legislative sentencing guidelines.

Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews *de novo*. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citations and footnotes omitted).].

We first note that defendant has abandoned his argument regarding OV 3 on appeal, given the paucity of his briefing. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant acknowledges that even though the bodily injury supporting the OV 3 score (see MCL 777.33[1][d]) was based on penetrations for which defendant was acquitted, the trial court nonetheless was empowered to find, by a preponderance of the evidence, the necessary facts to support the score. Presumably the trial court considered this legal principle, see, generally, *People v Sexton*, 250 Mich App 211, 228;

⁴ Defendant implies that the expert was not properly qualified to offer the testimony she provided, but the transcript reveals that she did indeed have the proper qualifications.

646 NW2d 875 (2002) (a trial court is presumed to know the law), in reaching its decision. Defendant has not adequately argued in what way the trial court's ruling was erroneous.

Defendant argues that there were not two penetrations arising out of one offense such that a score of 50 under OV 11 was supported. See MCL 777.41(1)(a) and (2)(a). While the language of *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2001), in some ways could be read to support a score of 50 under the present circumstances, the Michigan Supreme Court in *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2002), characterized that language as dicta, and in *People v Johnson*, 474 Mich 96, 101-102; 712 NW2d 703 (2006), this Court held that scoring both penetrations under OV 11 is not appropriate under circumstances such as those in the present case, where the penetrations allegedly occurred on separate and unrelated occasions.⁵ We note that the evidence did support a single penetration, despite the acquittals by the jury. Thus, the evidence supported a score of 25 points for OV 11. See MCL 777.41(1)(b). Deducting 25 points from defendant's total OV score changes it from 95 to 70 and reduces his sentencing guidelines range. See MCL 777.64. As such, resentencing is required. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

Defendant's convictions are affirmed but this case is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

⁵ Indeed, the prosecutor does not argue in its appellate brief that two penetrations occurred on one day but instead states that defendant penetrated the victim once with his finger and then, "[a] couple days later," with his penis.