

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

RICHARD HASSELBRING,

Defendant-Appellant/Cross-  
Appellee.

UNPUBLISHED

April 5, 2007

No. 257846

Eaton Circuit Court

LC No. 03-020327-FH

ON REMAND

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

PER CURIAM.

This case is before us on remand from our Supreme Court. *People v Hasselbring*, 477 Mich 931; 723 NW2d 458 (2006).<sup>1</sup> Defendant appeals as of right his conviction on one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under the age of 13). The prosecution cross-appeals as of right the trial court's directed verdict of acquittal on the second count of CSC II. We reverse the trial court's directed verdict of acquittal, reverse the order for resentencing, reverse the order granting a new trial, affirm in all other respects, and remand for further proceedings consistent with this opinion.

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<sup>1</sup> The Supreme Court remanded to us

for plenary consideration of (1) whether the trial court correctly determined that the defense expert's testimony would have been admissible without the hearsay and opinion evidence cited in the trial court opinion; and (2) whether trial counsel's failure to object to testimony he believed necessary for the admission of the defense expert's opinion deprived the defendant of effective assistance of counsel. [*Hasselbring, supra* at 931.]

I

A

Defendant's conviction arose from events of September 13, 2003, involving his then six-year-old step-grandson, the complainant. Defendant was originally charged with CSC II. At the preliminary examination, complainant testified that after defendant started tickling him, defendant pulled down complainant's pants and "touched [him] by his mouth" in the "private part." Complainant also "put [defendant's] private parts in [complainant's] mouth." On cross-examination, complainant admitted that this was the first time he stated that fellatio occurred, and stated when he gave his previous statements, "there was a lot of people" and he was scared and embarrassed.

The prosecution moved to amend the complaint and warrant to reflect two counts of CSC I. Defendant objected. The district court bound defendant over on two counts of CSC I, concluding that complainant's testimony was sufficiently credible to establish probable cause, and his mother, Lynn Mills, provided corroborating testimony. The district court rejected defendant's assertion that complainant's allegations were made only after continued questioning by Mills. The district court stated that credibility was for the trier of fact.

B

At trial, the following facts were adduced. Defendant lives in Eaton County with his wife, complainant's maternal grandmother. Complainant's mother (Mills) and father (Eric Emery) share joint physical custody, and complainant alternates spending seven days with each parent.

On September 13, 2003, complainant, along with Mills and complainant's one-year-old brother, went to visit defendant. After watching movies, complainant wanted defendant to tickle him as he has done in the past. Defendant normally tickled complainant "where people always tickle." After Mills complained about the noise they were making, defendant and complainant left the house and went into the pole barn. Inside the pole barn was a Volkswagen van. Defendant flipped the back seats of the van down and made the area up as a bed.

According to complainant, while on the "bed," defendant asked complainant if he could tickle complainant again. Unlike before, defendant tickled complainant, while he was clothed, "like in the private part." Complainant unzipped his own pants, and defendant tickled complainant in his private parts while complainant's pants were unzipped. Defendant's pants were unzipped also. Defendant continued tickling complainant until complainant's mother came to the pole barn, upon which defendant "pulled up his pants and zipped them up."<sup>2</sup> Mills approached the van, opened a door, and ordered complainant out.

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<sup>2</sup> According to Mills, after defendant and complainant were gone for approximately fifteen minutes, she went looking for complainant when he did not respond to her calls. She went to the pole barn; the doors were closed. The temperature outside was between 85 and 95 degrees.

(continued...)

Complainant further testified that he informed Mills, before leaving defendant's residence, that defendant tickled his private part. Later, when complainant learned that defendant denied that anything occurred, complainant "started crying because [defendant] lied to [his] mom." Complainant stated that defendant told him to "never tell anyone that he did that." Complainant did not remember anything other than the tickling of his private part.

Mills testified that once outside the barn, she asked complainant if any inappropriate touching occurred and complainant with his head down, responded, "no," while he scuffed rocks with his foot. She pursued the issue, and complainant again denied that anything occurred. Mills later telephoned Wayne Sleeman, her live-in boyfriend of two years, to come to defendant's house so she could discuss the situation. Once Sleeman arrived, Mills instructed him to not speak with complainant immediately. Complainant, Mills, Sleeman, defendant and Kathleen ate dinner, but little conversation occurred. Complainant and his mother left to go home.

After driving for ten minutes, Mills again asked whether any inappropriate touching occurred. Complainant denied that anything occurred. Mills then asked how did defendant tickle him and complainant stated that defendant tickled his armpits and his knees. Mills further testified that when they were approximately five minutes from home, complainant blurted from the back seat, "mom, I can't lie to you, I have to tell you the truth." Without objection from defendant, Mills testified that complainant said that "[h]e and Grandpa had touched each other's front private parts." Mills said that when they reached her house, she made complainant look her in the eye and tell her what he had said. Without objection, Mills testified: "And then he went on to say that Grandpa had held his mouth on top of his and he shoved his tongue in his mouth. And he said please tell Grandpa not to do that because that's disgusting."

Sleeman testified that he agreed to speak with complainant. Without objection from defendant, Sleeman testified that complainant said that he and defendant touched each other's private area.

Emery also spoke with complainant. When Emery asked what happened at defendant's house, complainant told Emery that defendant tickled him and then pointed down. Emery testified, without objection, that when he asked complainant to explain, complainant pointed down, while tickling and grabbing his own groin area. Emery testified that complainant also stated that there was skin to skin contact, that defendant made him pull his pants down, that defendant tickled his pee-pee, that defendant touched his penis and that complainant touched defendant's penis. Emery asked his wife, Lynda, to speak with complainant, given her experience both as a pre-school teacher and complainant's former teacher two years ago.

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(...continued)

Once inside the pole barn, she called for complainant before she observed him and defendant inside the van. The van doors were closed. She could see complainant from his forehead up and defendant, who, in "a lot of quick movement all at once," was "doing a lot of moving and adjusting his pants . . ."

Lynda testified that when she asked complainant if he knew why she and his father were there, complainant stiffened, pulled away from her, and stated, “the Grandpa thing.” Without objection, Lynda testified that complainant described the “Grandpa thing” as “Grandpa touched me wrong, he touched me inappropriately.” Lynda said she next asked if defendant touched his skin or clothes and whether defendant touched him while his pants were up or down, and that complainant responded that defendant touched his skin and that his pants were down.

Complainant also gave a statement to Detective Timothy Fandel, who has training in interviewing children under the Forensic Interview Protocol. Without objection, the transcript of complainant’s interview and the audiotape were admitted.

Fandel considered complainant’s reference to tickling as a red flag because it indicated “grooming.”<sup>3</sup> When Fandel asked complainant to describe what happened when he and defendant tickled, complainant responded that defendant touched him in the private. When asked to describe what he meant by the private, complainant responded “penis.” Complainant told Fandel that defendant licked his ears, licked his mouth, tickled him a little more and that’s when the “penis thing happened.” When asked if defendant said anything to him, complainant responded that defendant told a lie when he denied that anything happened, but that he (complainant) had told defendant that he would not tell anybody.

When asked if he had seen defendant’s private, he nodded his head to indicate yes, and stated that he tickled defendant’s and defendant tickled his. Complainant also stated that their penises were outside their pants. Complainant demonstrated how defendant closed his pants when Mills came into the barn.

## C

Defendant moved for a directed verdict of the CSC I charge. The prosecution responded by moving to amend the information to two counts of CSC II. Defendant opposed the prosecution’s motion. The trial court granted defendant’s motion for directed verdict, finding no evidence of penetration. The prosecution contended that defendant was not prejudiced by an amendment because CSC II is a lesser-included offense of CSC I and because defendant was originally charged with CSC II. Defendant declined to comment further, did not offer any opposing authority, and only requested that the jury be informed of the new charges.

Defendant presented character witnesses. Kathleen testified that the pole barn stays cool. Defendant admitted getting in the van with the complainant and stated that the tickling was mutual. He denied that any inappropriate contact occurred but agreed that his actions appeared inappropriate.

Steven Miller, PhD, testified as a defense expert in forensic psychology on the issue of complainant’s reliability. Miller criticized Fandel’s failure to explore alternative hypotheses in

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<sup>3</sup> Fandel did not elaborate on the term “grooming” and the prosecution did pursue the line of questioning. Generally, in the CSC context, grooming denotes the offender’s tactics and methods to make the intended victim comfortable with sexual contact.

his interview with complainant given: (1) that children between the ages of three and six years of age try to please adults, and (2) the number of pre-interviews between complainant and Mills, Emery, Lynda, and Sleeman. According to Miller, these interviews teach the child to provide the adults what they want to hear.

Although Miller could not comment on credibility, he stated this case was consistent “with the kind of things that might have influenced [complainant] to make a false statement.” Miller concluded that “the reliability of this child could be questionable.”

The jury convicted defendant on both counts of CSC II.<sup>4</sup>

#### D

Defendant appealed. Defendant also filed a post-judgment motion in the trial court seeking a new trial, judgment of acquittal, resentencing, or a *Ginther*<sup>5</sup> hearing. Defendant contended that hearsay may only be used to corroborate and not establish the elements of an offense. The prosecution filed a supplemental motion, arguing that the parties agree that the plain error test should apply, but no error occurred given trial counsel’s strategy.

The trial court denied the motions for new trial and a *Ginther* hearing on count I. The trial court granted the motion for judgment of acquittal on count II (and the motion for resentencing on count I).

The prosecution filed a cross-appeal of the dismissal of count II. Later, while retaining jurisdiction, we remanded to the trial court for an evidentiary hearing regarding whether defendant was denied his right to the effective assistance of counsel.<sup>6</sup>

On remand, after an evidentiary hearing, the trial court found defendant was denied the effective assistance of counsel and granted a new trial. The trial court concluded that (1) it was ineffective assistance of counsel to fail to object to hearsay evidence and opinion testimony, and (2) the hearsay evidence and opinion testimony were not necessary for Miller to testify.

This Court affirmed the grant of a new trial and remanded therefor.<sup>7</sup> However, our Supreme Court vacated this Court’s order for a new trial, and remanded to this Court.

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<sup>4</sup> In response to a question from the jury, the trial court instructed that “Count 1 is the allegation that the Defendant intentionally touched [complainant’s] genital areas or the clothing covering that area. Count 2 is the allegation that the Defendant made [complainant] touch his genital areas or the clothing covering that area.”

<sup>5</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>6</sup> *People v Hasselbring*, unpublished order of the Court of Appeals, entered April 17, 2006 (Docket No. 257846).

<sup>7</sup> *People v Hasselbring*, unpublished order of the Court of Appeals, entered July 21, 2006 (Docket No. 257846).

## II

### A

We first examine whether the trial court correctly determined that the defense expert's testimony would have been admissible without the hearsay and opinion testimony at issue. We review de novo decisions regarding the admission of evidence that involve a preliminary question of law, such as the interpretation of a rule of evidence. *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003).

MRE 703 provides, in relevant part: “*The facts or data in the particular case upon which an expert based an opinion or inference shall be in evidence.*” (Emphasis added.) Here, Miller opined that complainant's testimony was not reliable. Defense trial counsel did not object to the hearsay testimony about what complainant told others, because he believed this testimony was necessary as a foundation for Miller's later testimony that complainant was not reliable. We agree. The clear implication of Miller's testimony is that complainant was not reliable because he had changed his story.<sup>8</sup> Miller testified that he reviewed Fandel's interview with the complainant, and stated: “And so what you're noticing in these kind of cases is that [the] story evolves and changes as it goes along.”<sup>9</sup> Miller testified that “*from the testimony I heard, the reliability of this child could be questionable.*” We fail to see how Miller could have testified that complainant was not reliable, without the testimony showing that complainant's story had changed. Accordingly, because Miller relied on the fact that complainant had changed his story in response to questioning from various people, these facts (this testimony) on which Miller relied were required to be in evidence under MRE 703, and the trial court erred as a matter of law in concluding otherwise.

### B

Next, we consider whether trial counsel's failure to object to testimony he properly believed necessary for the admission of Miller's opinion deprived the defendant of effective assistance of counsel. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed

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<sup>8</sup> In his February 2004 affidavit, Miller expressly relied on the fact that “[d]uring . . . interviews, the minor child's allegations of sexual abuse by defendant substantially changed and evolved.”

<sup>9</sup> Defense trial counsel, in examining Miller, expressly referred to complainant's changing story, asking: “What about the significance . . . of the three denials leading up to a change in the story?”

under the federal sixth amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Here, defense trial counsel did not object to the hearsay testimony about what complainant told others, because he believed this testimony was necessary as a foundation for Miller's later testimony that complainant was not reliable. This belief by defense trial counsel was correct, as concluded above. Therefore, defense trial counsel could not reasonably be expected to have made an objection to testimony that was necessary for the admissibility of his expert's testimony. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (failure to make a futile objection does not constitute ineffective assistance of counsel). To have successfully objected to the hearsay testimony regarding complainant's statements to various persons, would have resulted in the exclusion of Miller's testimony regarding complainant's reliability *vel non*, and thus in the nullification of defendant's defense.

Defense trial counsel therefore strategically decided not to object to the hearsay testimony. This was a matter of trial strategy, which this Court will not second-guess. *Garza, supra*, at 255. The fact that trial counsel's strategy ultimately failed does not render its use ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Under the circumstances, defendant has not shown that counsel acted unreasonably. The trial court erred as a matter of law in concluding otherwise.

Defendant also argues that defense trial counsel was ineffective by failing to object to alleged opinion evidence in which other witnesses apparently opined on the credibility of complainant. We disagree. Although the opinion evidence was not necessary for the admission of Miller's testimony (because Miller in no way relied on such opinions), and although defense trial counsel could not have believed that it was, we find no reason to believe that the failure to object to some opinion evidence affected the outcome of the trial. *Garza, supra* at 255.

Defendant next argues that defense trial counsel was ineffective by failing to object to closing remarks by the prosecutor. The prosecutor argued:

. . . [H]e couldn't tell you in his own words the specifics of what happened to him  
. . . .

\* \* \*

. . . [H]e knows, he remembers what happened. He just didn't wanna [sic] talk about it. He's a six-year old kid, he's embarrassed, he's facing all of you and he's asked to describe an act many people never have to.

Defendant asserts that the comments were not supported by the evidence, and alluded to a more serious offense. We disagree.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), including that a witness should be believed, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), or that the defendant is not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state inferences blandly. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

Here, the prosecution in its opening statement informed the jury that (1) complainant would testify to inappropriate touching and acts of fellatio, and (2) at the conclusion of the case, the prosecutor would ask the jury to find that defendant committed CSC I. However, when the complainant failed to describe any acts of fellatio at trial, the prosecution explained why the complainant did not testify as anticipated and why the charges were amended to CSC II.

Complainant testified to various specifics of what happened and that he remembered his testimony to the district judge. In contrast, on each occasion where complainant was asked to describe what occurred when his and defendant's pants were unzipped, complainant always stated that he could not remember.

Given complainant's specific testimony concerning matters outside the van and his evasive testimony concerning what happened inside the van, the prosecution properly argued an inference, *based on evidence*, that complainant remembered more than he was willing or able to admit. Accordingly, the prosecutor's remarks were not improper. Defense trial counsel is not required to make futile objections. *Thomas, supra* at 457. Therefore, defense trial counsel did not commit ineffective assistance of counsel in failing to object to the prosecutor's argument.

## C

Defendant next argues that he was denied due process and a fair trial when the prosecution elicited improper opinion evidence and hearsay testimony. We disagree.

In order to preserve an evidentiary issue for appellate review, a party must object at trial and specify the same grounds for objection as it asserts at trial. MRE 103(a)(1); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Here, with the exception of unresponsive testimony from Lynda, defendant failed to object to any of the challenged opinion testimony. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights. *Id.* Generally, evidentiary rulings are reviewed for an abuse of discretion. *People v Small*, 467 Mich 259, 261; 650 NW2d 328 (2002).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Watson, supra* at 586. Because matters of credibility are to be determined by the trier of fact, it is improper for a witness to comment or provide an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

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In regard to opinion testimony, defendant cites Fandel's testimony that complainant stated that he was telling the truth. This is not impermissible opinion testimony. Fandel's testimony refers to his previous experiences, and was not a commentary or opinion on complainant's credibility. Further, the jury was free to conclude, given complainant's lack of details, that the instant case fell in the category of false allegations.

Next, defendant cites complainant's father's testimony indicating that complainant was "pretty honest." Defendant also challenges complainant's father and Mills's testimony indicating that (1) complainant exhibited certain behavior when he was lying, i.e. looking down, scuffing rocks and playing with his fingers, and (2) complainant would state he was just "kidding" when he was lying.

Regarding the comment that complainant was "pretty honest," defendant failed to object to the testimony, and therefore defendant's claim is subject to plain error analysis. *People v Knapp*, 244 Mich App 361, 384-385; 624 NW2d 227 (2001). Because "pretty honest" is not framed as an absolute belief of complainant's credibility (and indeed, could be viewed as "damning with faint praise"), and defendant failed to request a curative instruction that could have eliminated any possible prejudice, defendant has not established a basis for reversal. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant also cites to portions of Lynda's testimony:

Q: What did [complainant's father] say to you when he came out of the house?

A: His first statement was: "[complainant] doesn't lie to me, that was his first statement. And then he said – he told us that [complainant] told him Grandpa touched my penis."

Read in context, the prosecution was here attempting to establish the consistency in complainant's allegations, given defense counsel's comments in his opening statement that complainant gave differing versions of events. Accordingly, defendant opened the door to the prosecution's line of questioning. *Watson, supra* at 592-593. Furthermore, defendant's failure to request a curative instruction that could have eliminated any possible prejudice, eliminates a basis for reversal. *Ackerman, supra* at 449.

Defendant also argues that the trial court was required, sua sponte, to exclude the opinion evidence at issue, so that defendant receives a fair trial. We disagree. The evidence at issue was either not impermissible opinion testimony, or was not sufficiently prejudicial so as to deprive defendant of a fair trial. In sum, defendant has not established that he was denied a fair trial on

the basis that the prosecution elicited improper opinion testimony.

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Next, defendant argues that he was denied due process and a fair trial when the prosecutor elicited hearsay statements of what complainant told others. We disagree. As held above, admission of the hearsay testimony was necessary for defense trial counsel to admit the testimony of Miller. Defense trial counsel strategically chose not to seek exclusion of the hearsay testimony. Defendant purposely used the challenged hearsay testimony to support his defense theory.

A party may not seek appellate relief based on an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). “Defendant may not now claim as error on appeal that evidence he purposely used in support of his defense theory was inadmissible.” See *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Defendant purposely used the challenged hearsay testimony to support his defense theory. Accordingly, appellate relief is precluded.

D

Next, defendant argues that he was denied due process because there was insufficient evidence to sustain the verdict, and that the verdict was against the great weight of the evidence. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

This Court reviews for an abuse of discretion the trial court’s denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). This Court reviews a great weight of the evidence claim to determine whether the evidence preponderates heavily against the verdict to the extent that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). However, conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Id.* at 643.

CSC II requires proof that the defendant intentionally touched the complainant’s intimate parts if the touching can reasonably be construed as being for purposes of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner. MCL 750.520c(1)(a); MCL 750.520a(o); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

In the instant case, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to establish that defendant intentionally touched complainant’s genital areas or the clothing covering that area for a sexual purpose or in a sexual manner. Complainant’s testimony alone, even if uncorroborated, is sufficient to establish the elements of

CSC beyond a reasonable doubt. MCL 750.520h. Here, complainant testified that defendant tickled complainant's private parts while his pants were both zipped and unzipped. Complainant also testified that he tickled defendant's private parts while defendant's pants were unzipped. Given the totality of the testimony, a rational trier of fact could find that defendant's tickling was for a sexual purpose. In addition, the prosecution presented evidence to support a finding that defendant attempted to conceal his actions based on the record evidence that he (1) took complainant to a location away from public view, and (2) instructed complainant not to tell anyone. The record further shows that the jury also heard the taped interview with Fandel where complainant stated that defendant licked his ears and mouth, and tickled complainant while their penises were outside their pants. Accordingly, the evidence was sufficient to enable a rational trier of fact to find that the prosecution established beyond a reasonable doubt that defendant committed CSC II.

Based on this same evidence, defendant has failed to establish that the verdict was against the great weight of the evidence. Although the record contains evidence that complainant gave conflicting testimony and could not provide details beyond mutual tickling at trial, "[i]n general conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Lemmon, supra* at 643 (internal quotation marks and citations omitted).

Here, defendant cites to no circumstances that would justify the trial court overturning the jury's determination as to complainant's credibility. Defendant admitted taking plaintiff to the van and tickling complainant. Given the totality of the testimony, a factfinder could reasonably infer that "tickling" inside the van equated to inappropriate contact given defendant's instruction to complainant "not to tell."

Although defendant's testimony directly conflicted with complainant's trial testimony and his statements to Mills, Emery, Lynda, and Sleeman, complainant's allegation was plausible, given Mills's observations in the pole barn. Nor did complainant's testimony contradict indisputable facts or laws, or defy physical realities. *Id.* at 643-644. Because the issue became a matter of credibility, and the factfinder was the judge of defendant's and complainant's credibility, the trial court could not disturb the jury's determination. *Id.* at 644. Accordingly, the trial court did not abuse its discretion in determining that defendant's conviction was not against the great weight of the evidence.

## E

Next, defendant argues that the trial court erred in failing to grant a directed verdict and in allowing the prosecutor to amend the charges. We disagree.

A trial court's ruling on a motion for directed verdict is reviewed de novo. *People v Aldrich*, 246 Mich App 101, 127; 631 NW2d 67 (2001). Defendant moved for directed verdict, which the trial court granted with regard to the CSC I charge. Given this relief, we fail to see how defendant can be granted a new trial.<sup>10</sup>

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<sup>10</sup> Defendant's argument, in this portion of his brief, refers to his motion for a directed verdict (continued...)

Defendant also argues that the trial court erred in granting the prosecution's motion to amend the information. When the prosecution moved to amend the information to reflect the CSC II charges, defendant did not object on the grounds that the amendment was impermissible because CSC II is a cognate offense of CSC I. Instead, defendant objected to the timeliness of the amendment and the lack of evidentiary support for a CSC II charge. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Unpreserved constitutional error is reviewed for the plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court reviews a trial court's decision on a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003).

An information may be amended before, during or after trial to cure a defect, imperfection or omission as long as the defendant is not prejudiced. MCL 767.76;<sup>11</sup> MCR 6.112(H).<sup>12</sup> Unacceptable prejudice includes unfair surprise, inadequate notice, or inadequate opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

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(...continued)

made after the close of the prosecution's proofs. To the extent that plaintiff intended to argue, or implies, that the trial court erred in denying his (renewed) motion for a directed verdict of acquittal (made after the verdict), we disagree. There was, as we conclude in other portions of this opinion, sufficient admissible evidence in support of the jury's verdict of guilty on both counts of CSC II.

<sup>11</sup> MCL 767.76 provides in pertinent part:

No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall *on his motion* be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy . . . . [Emphasis added.]

<sup>12</sup> MCR 6.112(H) provides:

(H) Amendment of Information. The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must

(continued...)

In *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998), the Supreme Court held that “[w]here a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial.” Here, defendant was originally charged with CSC II, and the preliminary examination was held on that charge. Thus, under *Goecke*, defendant cannot claim unfair prejudice, particularly where (1) defendant does not articulate how his defense or strategy would have been different had he been bound over as originally charged, and (2) defendant did not file, under MCL 767.76, a motion to discharge the jury or seek a continuance.

Defendant contends that amendment of the information to CSC II was impermissible because CSC II is an uncharged cognate lesser offense of CSC I, and the prosecution could not amend the information to avoid a directed verdict on the original charges. We disagree.

CSC II is a cognate lesser offense of CSC I. *Lemons*, *supra* at 254. Under MCL 768.32,<sup>13</sup> instructions on cognate lesser offenses are impermissible because they do not provide a defendant with adequate notice that he might be charged with the lesser offense. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002).

But *Cornell* is inapplicable here. The CSC II offenses were not uncharged. Once the trial court dismissed the CSC I counts, the CSC II charges as reflected in the amended information became the sole charged offenses, thus the jury in this case was not instructed on a cognate lesser offense, but on the principal charges. MCL 767.76. Given that defendant was originally charged with CSC II, and defendant failed to offer any opposing authority when given the chance, defendant received adequate notice and the trial court properly amended the information. *Goecke*, *supra*. We find no plain error and no abuse of discretion.

## F

Next, defendant argues that he was denied his statutory right to a preliminary examination and his constitutional right to notice of the charges, when the district court magistrate allowed the prosecutor to add two counts of CSC I after the proofs presented at the preliminary examination. We disagree. This Court reviews the magistrate’s bindover decision for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

The right to a preliminary examination is statutory, not constitutional. *People v Apgar*, 264 Mich App 321, 328; 690 NW2d 312 (2004). To bind a defendant over for trial on a felony

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(...continued)

strike unnecessary allegations from the information.

<sup>13</sup> MCL 768.32 provides:

(1) Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

charge, the magistrate must find that there is sufficient evidence to indicate that a felony has been committed and probable cause that the defendant committed it. MCL 766.13; *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1980). There must be evidence of each element of the crime charged or evidence from which each element may be inferred. *Id.*

In *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993), the Supreme Court held that an information may be amended with a new charge if the amendment will not cause “unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend.” This Court affirmed the magistrate’s refusal to allow the prosecutor to amend the information to add a new charge at the end of the preliminary examination. *Id.* at 361. The Supreme Court reversed, concluding that the prosecutor should have been allowed to amend the information with the new offense. *Id.* at 363-365. The Court reasoned that the amendment did not prejudice the defendant because the preliminary examination testimony supported the new charge, there was no indication that defense counsel’s actions at the preliminary examination would have been any different had he known of the new charge, and the prosecutor offered to allow additional questioning of witnesses. *Id.* at 364-365.

Here, defendant has not shown that the amendment caused unfair surprise, inadequate notice, or an insufficient opportunity to defend. Defendant asserts that had he known in advance of the new allegations, he could have prepared questions about the penetration or waived them. However, the record shows that when the complainant testified to acts of penetration, defendant had the opportunity to question complainant regarding the specific allegations during the examination. Defendant was able to elicit from complainant that his testimony describing fellatio was the first time he indicated that fellatio occurred. Nor does defendant explain how he was prevented from developing questions during the preliminary examination. Given that there is no dispute concerning the complainant’s age and his testimony, and Mills’s observations were adequate to show either the sexual contact element of CSC II or the penetration element of CSC I, the magistrate did not abuse its discretion in binding over defendant on the higher offense. *People v Gonzales*, 214 Mich App 513, 516-517; 543 NW2d 354 (1995) (magistrate did not abuse its authority by sua sponte binding over the defendant on a higher offense based on the proofs submitted at the preliminary examination).

## G

Next, defendant argues that it was reversible error for the trial court to conduct a competency examination of complainant in the presence of the jury, and then fail to make a finding of competency. We disagree. The determination of competency of witnesses is within the discretion of the trial court. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998).

Defendant not only failed to object to the admission of complainant’s testimony on the basis of incompetence; defense counsel participated in the competency examination of the complainant. A defendant may not “harbor error as an appellate parachute.” *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Accordingly, the issue is waived. *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981). Also, “[i]t is not error for the judge to examine the child witness in front of the jury to determine the child’s competency to testify.” *People v Houghteling*, 183 Mich App 805, 809; 455 NW2d 440 (1991).

Moreover, the trial court is not required to make a finding of competency after

questioning a child witness. Under MRE 601, every person is competent to testify *unless the court finds after questioning* that the person lacks the physical or mental capacity or sense of obligation to testify in a truthful manner. Pursuant to the court rule, a trial court must question a witness before making a determination that a witness is not competent to testify, and because a witness is presumed competent, a finding of incompetency is required only if the trial court concluded complainant lacked the capacity or obligation to state the truth. *Watson, supra* at 583. In sum, defendant has failed to establish an abuse of discretion.

## H

Next, defendant argues that he was denied a fair trial when the prosecutor argued facts not in evidence. We disagree. Defendant failed to object to the prosecution's comments. Therefore, the issue is unpreserved and reviewed for plain error. *McLaughlin, supra* at 645. We have already concluded above that the prosecution's remarks were not misconduct.

## I

Next, defendant argues that the cumulative effect of errors require relief because he did not receive a fair trial. We disagree. "This Court reviews a cumulative-error argument to determine whether the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Because we have concluded that defendant's other claims lack merit, there are no errors to aggregate. See, e.g., *Bahoda, supra* at 293 n 64.

## III

On cross-appeal, the prosecution argues that the trial court erred in "dismissing" count II after the verdict was rendered, finding insufficient evidence to support it. We agree.

When reviewing a trial court's decision on a motion for a directed verdict of acquittal, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). We review the trial court's evidentiary decisions for abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). But evidentiary decisions frequently involve preliminary questions of law, such as whether a rule of evidence bars admission of the evidence, and we review such questions of law de novo. *Id.* Whether MRE 803A barred the admission of complainant's hearsay statements to Mills and others is a question of law.

Count II alleged that defendant made complainant touch defendant's intimate parts. The parties do not dispute that CSC II includes an intentional touching of defendant's intimate parts, if the touching can reasonably be construed as being for purposes of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner. MCL 750.520c(1)(a); MCL

750.520a(o).<sup>14</sup>

In the instant case, viewing the evidence in the light most favorable to the prosecution, the admissible evidence was sufficient to establish that defendant made complainant touch defendant's genital area or the clothing covering that area for a sexual purpose or in a sexual manner. Mills testified that when she and complainant were approximately five minutes from home after the alleged incident, complainant blurted from the back seat, "mom, I can't lie to you, I have to tell you the truth." Without objection from defendant, Mills testified that complainant then said that "[h]e and Grandpa had touched each other's front private parts."

A sub-issue is whether this hearsay testimony by Mills was admissible under MRE 803A. We hold that it was.

MRE 803A provides, in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant . . . is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;

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<sup>14</sup> MCL 750.520a(o) provides:

"Sexual contact" includes the intentional touching of the victim's *or actor's* intimate parts or the intentional touching of the clothing covering the immediate area of the victim's *or actor's* intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- (i) Revenge.
- (ii) To inflict humiliation.
- (iii) Out of anger. [Emphases added.]

This statutory language is unambiguous, and it clearly includes, in the definition of "sexual contact," an instance where the defendant causes the victim to touch the defendant's intimate parts. In other words, "sexual contact" includes instances where the defendant intentionally causes contact between the defendant's intimate parts and the victim's body.

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

*If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. [Italics added.]*

See also *People v Katt*, 468 Mich 272, 295-296; 662 NW2d 12 (2003) (“Moreover, the statement made to Ms. Bowman is more probative than DD’s testimony at trial *for the same reasons that underscore the tender-years rule. As time goes on, a child’s perceptions become more and more influenced by the reactions of the adults with whom the child speaks. It is for that reason that the tender-years rule prefers a child’s first statement over later statements.*” (emphasis added)).

Thus, under MRE 803A, only complainant’s first corroborative statement about the alleged incident was admissible. Complainant’s first corroborative statement was to Mills in the car. The testimony of Sleeman, Emery and Fandel, to the same effect, was inadmissible.

However, defense trial counsel strategically decided not to object to the hearsay testimony of Mills, Sleeman, Emery and Fandel, in order to allow Miller to use it as a basis for his expert opinion. “Defendant may not now claim as error on appeal that evidence he purposely used in support of his defense theory was inadmissible.” *Potra, supra* at 512.

The trial court held that Mills’s hearsay testimony did not directly corroborate complainant’s testimony, and therefore Mill’s testimony about complainant’s hearsay was not rendered admissible by MRE 803A. This was error. Complainant’s hearsay statements to Mills in the car indicated that there was touching of intimate parts between complainant and defendant. Likewise, complainant’s direct testimony also indicated that there was touching of intimate parts between complainant and defendant.<sup>15</sup> MRE 803A nowhere contains a hard and fast requirement that the hearsay must be *exactly the same testimony* as the testimony it corroborates. This Court must apply the plain meaning of MRE 803A as written, not apply a more stringent version. See *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002) (we use canons of statutory construction when interpreting court rules); *Yudashkin v Linzmeyer*, 247 Mich App 642, 649; 637 NW2d 257 (2001) (court’s duty is to apply the unambiguous language of the court rule). Because Mills’s hearsay testimony generally corroborates complainant’s testimony, the trial court erred as a matter of law in its interpretation of MRE 803A, and Mills’s hearsay testimony was admissible under MRE 803A.

Defendant contends that Mills’s hearsay testimony is inadmissible under MRE803A(2) because complainant’s statement to Mills was not spontaneous and there were indications of manufacture. We disagree. Mills’s testimony suggests that the statement by complainant in the

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<sup>15</sup> Notably, complainant testified that while the ticking was occurring, defendant’s pants were unzipped.

car was spontaneous, since complainant blurted it out in the car after stating that he could not tell a lie. MRE 803A(2). We find insufficient circumstances to suggest that complainant manufactured the statement made to Mills in the car. On the contrary, complainant's prefatory comment to Mills, "mom, I can't lie to you, I have to tell you the truth[.]" suggests that complainant was feeling pangs of conscience at having failed to reveal the sexual contact, and indicates an absence of manufacture.

With regards to MRE 803A(3), the circumstances also suggest that any delay between the alleged incident and the statement to Mills in the car was excusable given the fear naturally felt by a young child after having been sexually assaulted. *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996) ("the trial court did not abuse its discretion in ruling the eight- or nine-month *delay in reporting the sexual abuse was excusable on the basis of the young victim's well-grounded fear of defendant*" (emphasis added)).

The admissible hearsay statement of complainant to his mother, in the car, directly and strongly supports the jury's verdict of guilty on count II. Mills testified that complainant said that "[h]e and Grandpa had touched *each other's* front private parts." (Emphasis added.) In addition, the prosecution presented evidence to support a finding that defendant attempted to conceal his actions. Defendant took complainant to a location away from public view, and instructed complainant not to tell anyone. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Lee, supra* at 167-168. Defendant's act of taking complainant to a location well secured from public view (in the barn, with both doors closed and then inside the van, where defendant flipped the back seats down and made the area up as a bed), and his instruction to complainant not to tell anyone, are circumstantial evidence in support of the hearsay testimony. Accordingly, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that defendant made complainant touch defendant's genital areas or the clothing covering that area, for a sexual purpose or in a sexual manner. The trial court erred as a matter of law in granting a directed verdict of acquittal on count II of CSC II.

#### IV

In conclusion, (1) the defense expert's testimony would *not* have been admissible without the hearsay evidence at issue, though it would have been admissible without the opinion evidence at issue; (2) defense trial counsel's failure to object to testimony he believed necessary for the admission of the defense expert's opinion did *not* deprive defendant of effective assistance of counsel; (3) defendant was not denied due process or a fair trial on the basis that the prosecution elicited improper opinion evidence; (4) defendant was not denied due process or a fair trial when the prosecutor elicited hearsay statements, because defendant purposely used the challenged testimony; (5) defendant was not denied due process because the prosecution presented sufficient evidence to support the verdict, and the verdict was not against the great weight of the evidence; (6) the trial court did not abuse its discretion by granting leave to amend the felony information; (7) the magistrate did not abuse his discretion in binding defendant over on two counts of CSC I; (8) defendant waived any error in holding the competency examination of the complainant in the presence of the jury; (9) defendant was not denied a fair trial by reason of prosecutorial misconduct; (10) defendant was not denied effective assistance of counsel by a failure to object to the prosecutor's closing argument; (11)

defendant has not established a entitlement to relief under the cumulative error rule; and (12) the trial court erred in dismissing the second count of CSC II.

Accordingly, we reverse the trial court's judgment of acquittal on the second count of CSC II, reverse the order for resentencing,<sup>16</sup> reverse the order granting a new trial, affirm in all other respects, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder  
/s/ Brian K. Zahra

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<sup>16</sup> Our order staying resentencing is now moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).