

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 24, 2013

v

EARL ROBERT KRANZ,
Defendant-Appellant.

No. 304853
Allegan Circuit Court
LC No. 10-016625-FC

Before: WHITBECK, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant Earl Robert Kranz appeals as of right his jury trial convictions of six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13), and one count of aggravated indecent exposure, MCL 750.335a(2)(b). After this Court remanded for an evidentiary hearing on the issue of whether defendant's trial counsel was ineffective for failing to impeach other-acts witnesses,¹ the trial court granted defendant a new trial on December 13, 2012. We vacate the trial court's grant of a new trial and affirm defendant's convictions.

Defendant was convicted of repeatedly sexually assaulting the victim who was under 13 years of age at the time of the assaults. At trial, two other-acts witnesses, R.K. and J.L., testified pursuant to MRE 404(b) and MCL 768.27a concerning sexual misconduct allegedly committed by defendant against them while they were younger. Concurrent with filing his brief on appeal, defendant moved to remand for an evidentiary hearing to determine whether defendant's trial counsel was ineffective for failing to impeach R.K. and J.L. with evidence from earlier proceedings related to their claims against defendant.

At the *Ginther*² hearing, trial counsel testified that he was aware of the earlier proceedings and documentary evidence related to those proceedings. These documents included findings by social workers and psychologists that R.K. may have been coached into fabricating

¹ *People v Kranz*, unpublished order of the Court of Appeals, entered April 12, 2012 (Docket No. 304853).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

allegations against defendant, and that J.L. had the capacity to fabricate allegations against defendant, towards whom she was described as acting as a “bully.” Trial counsel testified, and the trial record showed, that he attempted to inquire about these matters on cross-examination, but the trial court’s evidentiary rulings precluded him from doing so. Trial counsel did not seek to admit any of the documents from the earlier proceedings, nor did he present any of them at defendant’s trial. But, he attempted to ask the witnesses on cross-examination about information contained in the documents, and by asking defendant about the other proceedings on direct examination. Following the *Ginther* hearing, the trial court entered an order granting defendant a new trial, but stayed the order pending the resolution of this appeal.

We first vacate the trial court’s order for a new trial because it was outside the scope of this Court’s remand order. “When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order.” *People v Russell*, 297 Mich App 707, 714; 825 NW2d 623 (2012). In this case, this Court’s remand order provided, in pertinent part:

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is GRANTED. This matter is REMANDED for an evidentiary hearing and a determination whether defendant-appellant received constitutionally-deficient representation . . . when counsel failed to elicit testimony and present evidence which would have demonstrated that the other acts witnesses were incredible. The Court retains jurisdiction and the time for proceeding with the appeal in this Court shall begin to run upon issuance of an order in the trial court that disposes of the post-conviction proceedings.

Defendant-appellant shall file with this Court a copy of any motion and supporting brief filed in the trial court within 14 days after the Clerk’s certification of this order. Defendant-appellant shall also file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry. The trial court shall hear and decide the matter within 56 days after the Clerk’s certification of this order. The trial court shall make findings of fact and a determination on the record and cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings. [*People v Kranz*, unpublished order of the Court of Appeals, entered April 12, 2012 (Docket No. 304853).]

Significantly, in remanding we retained jurisdiction and did not direct defendant to file a motion for a new trial. Therefore, the trial court’s order granting defendant a new trial was outside the scope of this Court’s remand order. See *People v Smith*, 464 Mich 876; 630 NW2d 625 (2001). We vacate the trial court’s order granting a new trial. In ruling that the trial court exceeded the scope of our remand order, we distinguish this case from *Russell*, 297 Mich App at 714-715, wherein the trial court did not exceed the scope of this Court’s remand order, which expressly directed the defendant to file a motion for a new trial.

Having vacated the trial court’s order granting defendant a new trial, we consider the merits of defendant’s ineffective assistance of counsel claim. A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if “counsel’s performance fell below

an objective standard of reasonableness, . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court presumes that trial counsel was effective, and in order to show that counsel’s performance fell below an objective standard of reasonableness, “defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Prejudice requires “the defendant [to] show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Id.* at 600. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland*, 466 US at 694.

We find that defendant fails to satisfy his burden of establishing that trial counsel’s performance fell below an objective standard of reasonableness with regard to his cross-examination of R.K. and J.L. This Court will not, with the benefit of hindsight, second-guess matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Trial counsel attempted to impeach the witnesses by asking them questions on cross-examination, but the trial court prevented him from doing so. Trial counsel was not required to continue to argue the trial court’s ruling, because trial counsel is not required to make a meritless or futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Moreover, defendant fails to articulate on appeal any argument regarding whether evidence from the earlier proceedings would have been admissible, either as substantive or impeachment evidence, such that counsel should have sought to admit the evidence instead of merely attempting to cross-examine the witnesses. We decline to address issues not briefed by the parties. See *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993). Therefore, we find that defendant fails to satisfy his burden of demonstrating that trial counsel’s performance was objectively unreasonable. See *Carbin*, 463 Mich at 599-600 (placing the burden on the defendant to prove that his trial counsel’s performance was objectively unreasonable).

Next, defendant argues that he was denied his right of confrontation when the trial court permitted the victim to testify behind a screen. Defendant did not object; therefore we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiture under the plain error rule, a defendant must establish that there is clear or obvious error that affected the outcome of the lower court proceedings, i.e., defendant was prejudiced. *Id.* A plain error affecting substantial rights warrants reversal only if it “resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings.” *Id.* (quotation marks and citation omitted).

“The Sixth Amendment’s Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004), quoting US Const, Am VI. The Michigan Constitution also affords a defendant the right to confront adverse witnesses. Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011). A defendant’s right of confrontation is “underscored by MCL 763.1, which provides a criminal defendant the express right to ‘meet the witnesses who are produced against him face to face.’” *Fackelman*, 489 Mich at 525, quoting MCL 763.1. The right of confrontation is essential to fairness and integrity in fact-finding, and face-to-face confrontation is an important

part of ensuring integrity in the fact-finding process. *Coy v Iowa*, 487 US 1012, 1019; 108 S Ct 2798; 101 L Ed 2d 857 (1988). As explained by the United States Supreme Court in *Coy*:

It is always more difficult to tell a lie about a person “to his face” than “behind his back.” In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss the right to cross-examine the accuser; both “ensur[e] the integrity of the fact-finding process.” The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential “trauma” that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. [*Id.* at 1019-1020 (citation omitted).]

However, the right to face-to-face confrontation of adverse witnesses is not absolute. *People v Rose*, 289 Mich App 499, 511-515; 808 NW2d 301 (2010). For instance, a trial court may employ certain protections for witnesses who testify at trial, including permitting the witness to testify behind a screen that blocks the witness’s view of the defendant. *Id.* at 515-516. “In order to warrant the use of a procedure that limits a defendant’s right to confront his accusers face to face, the trial court must first determine that the procedure is necessary to further an important state interest.” *Id.* at 516. The United States Supreme Court has “recognized that the states have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment.” *Id.* at 515. However, to use a procedure, such as a screen, that limits the defendant’s right to face-to-face confrontation, the trial court must make particularized findings that the procedure is necessary to protect the witness. *Coy*, 487 US at 1021-1022; *Rose*, 289 Mich App at 516. “In order to find that the procedure is necessary, the court must find that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*.” *Rose*, 289 Mich App at 516. In addition, denial of defendant’s right to confrontation is permitted “only where the reliability of the testimony is otherwise assured.” *Maryland v Craig*, 497 US 836, 850; 110 S Ct 3157; 111 L Ed 2d 666 (1990). This “is assessed by three indicators: (1) the taking of an oath, (2) the availability of cross-examination, and (3) the observation of the witness by the jury.” *People v Buie*, 491 Mich 294, 305; 817 NW2d 33 (2012).

In the case at bar, the record is devoid of a finding by the trial court that the use of a screen was necessary to further an important state interest or to protect the witness from emotional distress. Accordingly, based on the record before us, the trial court’s authorization of

the screen during the victim's testimony violated defendant's right of confrontation.³ *Coy*, 487 US at 1021-1022; *Rose*, 289 Mich App at 518. However, because defendant did not object, he must demonstrate plain error affecting substantial rights. *People v Cain*, 299 Mich App 27, 40; 829 NW2d 37 (2012). On this record, defendant cannot establish that his substantial rights were affected. Although the victim was shielded from defendant, the remaining elements of confrontation were still present. Indeed, the victim was physically present in the courtroom, testified under oath, and was subject to cross-examination. These elements of confrontation help ensure reliability in the truth-seeking process. See *Rose*, 289 Mich App at 513, 517. Our Supreme Court has held the ability to cross-examine a witness is crucial to determining whether a violation of the defendant's right of confrontation resulted in prejudice. See *Fackelman*, 489 Mich at 539 (holding that where the violation of the defendant's right of confrontation included the inability to cross-examine the witness, the defendant suffered prejudice). Additionally, the record in this case suggests that the screen allowed the jury to see the victim, and that it only obscured the victim's view of defendant. Accordingly, the jury was able to observe the victim and her demeanor in spite of the screen, thereby helping to ensure the reliability of the truth-seeking process. See *Rose*, 289 Mich App at 513, 517. See also *People v Pesquera*, 244 Mich App 305, 313-314; 625 NW2d 407 (2001). Moreover, defendant cannot establish outcome-determinative prejudice because there was evidence to corroborate the victim's testimony against defendant, most notably the other acts testimony offered by R.K. and J.L. Our Supreme Court has observed that evidence of a defendant's sexual interest in children is "exceptionally probative" evidence in a prosecution for sexual offenses committed against a minor. *People v Watkins*, 491 Mich 450, 476; 818 NW2d 296 (2012) (quotation marks and citation omitted). Additionally, there was evidence presented that defendant's semen was found at a specific location where the victim testified that sexual abuse occurred and semen would be found.

Defendant next argues that the trial court's employment of the screen in the case at bar violated his right to be presumed innocent. In *Rose*, 289 Mich App at 517-521, the panel examined a similar issue, and determined that the defendant's due process right to a fair trial, which included the right to be presumed innocent, was not violated by the use of a screen in that case. In so ruling, this Court found that a screen was not inherently prejudicial because it was "not the type of device that brands a defendant with the mark of guilt, such as wearing prison garb or being shackled and gagged." *Id.* at 520. As explained by the panel in *Rose*:

Although a juror might conclude that the witness fears the defendant because the defendant actually harmed the witness, a reasonable juror might also conclude that the witness fears to look upon the defendant because the witness is not

³ We recognize that the trial court may have made the necessary findings regarding the use of the witness screen. At a motion hearing prior to trial, the trial court stated the following: "The Court has had prior hearings on motions in this case and as I recollect it the Court approved the use of a witness screen" However, the record does not contain a transcript of the referenced hearing where the findings may have been made, and the order does not reference any findings. The trial court must make the necessary findings to approve the use of a witness screen, and based on the record before us, the trial court did not do that.

testifying truthfully. A reasonable juror could also conclude that the screen is being used to calm the witness's general anxiety about testifying rather than out of fear of the defendant in particular. Likewise, anytime a child victim testifies against a defendant who is accused of harming the child victim, the jury is going to reasonably infer that the child has some fear of the defendant. Finally, there are a variety of different screens and screening techniques that may be employed to shield a victim from having to see the defendant and, for that reason, the potential for prejudice will vary depending on the particular screen or screening technique employed. Accordingly, we cannot conclude that the use of a screen—no matter what its size or composition may be and no matter how it was employed at trial—must in every case be presumed to prejudice the defendant. [*Id.*]

Here, as in *Rose*, the record is largely void with regard to a description of the screen. In *Rose* we held that the shape, color, and size of the screen, as well as the materials used to construct the screen affect whether the screen is prejudicial. *Id.* Indeed, it is not apparent from the record whether the screen was excessively large or whether it was positioned in an obstructive manner. Thus, on this record, defendant has not demonstrated plain error. Furthermore, even if he could, he is not entitled to relief on this issue because he cannot demonstrate that he was prejudiced by the use of the screen as previously discussed. *Id.* Further, the trial court twice cautioned the jury that it was not to draw any inferences from the use of the screen, and this Court presumes that jurors follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Because we find that defendant is not entitled to relief on this claim, we reject his accompanying claim for ineffective assistance of counsel because although trial counsel's performance was objectively unreasonable for failing to object to the use of the screen, we find that defendant is unable to establish prejudice.

Lastly, defendant argues that the prosecutor committed misconduct because she asked defendant to comment on the credibility of several prosecution witnesses. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Here, defendant did not raise a contemporaneous objection to the prosecutor's conduct, and, although he requested a curative instruction, he waited to do so until challenging a different matter outside the presence of the jury. Thus, the issue is unpreserved. "Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "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." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). In the case at bar, we find that the prosecutor's questions were improper because she directly asked defendant to comment on the credibility of the victim and several other prosecution witnesses. See *id.*

However, this error does not entitle defendant to a new trial because he cannot demonstrate outcome-determinative plain error. *Unger*, 278 Mich App at 235. Here, the prosecution's improper questions were not outcome determinative because defendant's theory of the case was that the prosecution's witnesses, particularly the victim, lacked credibility. Therefore, where defendant's theory of the case was that the witnesses lied, he was not harmed when the prosecutor asked him about the credibility of those witnesses. See *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Furthermore, the trial court issued a curative instruction upon request. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235. Consequently, defendant cannot demonstrate that he is entitled to relief on this issue.

Lastly, in his statement of questions presented, defendant suggests that the prosecutor impermissibly requested that defendant's wife comment on the prosecution's witnesses. Defendant does not brief this issue, nor does he cite any facts in support of his assertion. Therefore, he abandons this argument and we will not consider the matter. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("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 with little or no citation of supporting authority.").

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens