TITLE PAGE

INSTRUCTIONS: This application is for use in *criminal* appeals only. If you are appealing a Court of Appeals decision involving a civil action, use the form designed for that appeal type. Answer each question completely and add more pages if necessary.

IN THE MICHIGAN SUPREME COURT

PRO PER CRIMINAL APPLICATION FOR LEAVE TO APPEAL

I am appealing a Court of Appeals decision that affirmed my conviction(s) and sentence(s) in whole or in part, affirmed the trial court's denial of my motion for relief from judgment, or denied my application for leave to appeal in that court.

PEOPLE OF THE STATE OF MICHIGAN.

Plaintiff-Appellee,

v

STEVEN LEE MONTEZ
(Print your name)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank)

Court of Appeals No. 353119
(See Court of Appeals decision)

Trial Court No. 19-003225-FC
(See Court of Appeals decision or PSIR)

I am currently incarcerated in a Michigan, federal, or other state correctional facility. ☑ Yes ○ No

If Yes, provide the name and address of the correctional facility:

GUS HARRISON CORRECTIONAL FACILITY
(Print name of correctional facility)

2727 E. BEECHER ST.
(Print street address of correctional facility)

ADRIAN, MI 49221
(Print city, state and zip code of correctional facility)

FILING DEADLINE: For incarcerated persons, the application will be accepted as timely filed by the Supreme Court if received on or before the 56-day filing deadline or if it bears a date stamp from the correctional facility on or before the filing deadline and (1) the case involves a criminal appeal, (2) you are incarcerated, (3) you are acting without an attorney, and (4) you include a sworn statement identifying the date the papers were given to the correctional facility for mailing to the Court and indicating that first-class postage was prepaid. MCR 7.305(C)(4).

For persons who are not incarcerated, the application must be received by the Supreme Court on or before the 56-day deadline or it will be rejected as untimely. No extensions can be given to the filing deadline.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

STEVEN LEE MONTEZ, Appellant Court of Appeals No. 353119

(Print your name)

INSTRUCTIONS: In the sections below, write out those issues you want to raise in the Supreme Court that were raised in the Court of Appeals in either a brief prepared by your attorney or a supplemental brief that you prepared. To raise new issues, go to page 8.

ISSUES RAISED IN COURT OF APPEALS

ISSUE I:

A. Write the issue exactly as it was phrased in the Court of Appeals brief.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONSULT OR CALL AN EXPERT WITNESS TO REBUT THE PROSECUTION'S EXPERT WITNESS REGARDING CHILD SEXUAL ABUSE DISCLOSURE AND TREATMENT.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle that is very important to Michigan law.
- ☑ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.

THERE WERE NUMEROUS FLAWS IN THE TESTIMONY OF THE PROSECUTION'S EXPERT WITNESS, WLLUDING THE PERCENTAGE OF DELAYED DISCLOSURES, TRAUMA PRODUCING DISJOINTED MEMORIES, AND AN ERRONEOUS CLAIM ABOUT FALSE MEMORIES REQUIRING A DELIBERATE PROCESS, SUCH AS COACHING. HAD TRIAL COUNSEL CALLED AN EXPERT WITNESS, HE WOULD HAVE REFUTED THESE INCORRECT CLAIMS, RESULTING IN A REASONABLE PROBABILITY OF ACQUITTAL.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

STEVEN LEE MONTEZ, Appellant Court of Appeals No. 353119

(Print your name)

ISSUE II:

A. Write the issue exactly as it was phrased in the Court of Appeals brief.

MR. MONTEZ WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY CHARACTERIZED THOMAS COTTRELL'S EXPERT TESTIMONY AS CORROBORATION OF THE COMPLAINANTS' STORIES. FURTHER, THE TRIAL COURT'S REFUSAL TO GIVE A CURATIVE INSTRUCTION WAS REVERSIBLE ERROR.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☑ 2. The issue raises a legal principle that is very important to Michigan law.
- ☑ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.

BECAUSE OF THIS IMPROPER CHARACTERIZATION OF TESTIMONY BY AN EXPERT WITNESS AS CORROBORATIVE, THE COMPLAINANTS' TESTIMONY WAS IMPLICITLY GIVEN WEIGHT THAT UNFAIRLY AFFECTED THE TRIAL. FURTHERMORE, THE COURT'S FAILURE TO GIVE A CURATIVE INSTRUCTION COMPOUNDED THE HARM OF THE PROSECUTOR'S ERRONEOUS ARGUMENT. BECAUSE OF THIS ERROR, MR. MONTEZ IS ENTITLED TO A NEW TRIAL.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

STEVEN LEE MONTEZ, Appellant Court of Appeals No. 353119

(Print your name)

ISSUE III:

A. Write the issue exactly as it was phrased in the Court of Appeals brief.

MR. MONTEZ WAS DENIED A FAIR TRIAL WHERE THE COMPLAINING WITNESS HAD AN EMOTIONAL BREAKDOWN AND HER LOVED ONES RUSHED TO THE WITNESS STAND TO COMFORT HER IN FRONT OF THE JURY, AND THE TRIAL COURT DID NOTHING TO CURE THE ERROR.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☑ 2. The issue raises a legal principle that is very important to Michigan law.
- ☑ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.

THE ERROR HERE IS TWOFOLD. FIRST, THE JURORS, AFTER WITNESSING AN EMOTIONAL OUTBURST AND NON-WITNESSES APPROACHING THE WITNESS STAND, WERE NEVER QUESTIONED BEFORE RESUMING THE PROCEEDINGS, IF THEY COULD STILL BE IMPARTIAL AFTER WITNESSING SUCH AN EMOTIONALLY CHARGED AND CHAOTIC SCENE. SECOND, THE TRIAL COURT FAILED TO GIVE A CURATIVE INSTRUCTION, DUE TO THE INCIDENT ITSELF, AND THE TRIAL COURT ABDICATING ITS RESPONSIBILITY TO QUESTION THE JURORS IN A SITUATION LIKE THIS, THE FAIRNESS AND INTEGRITY OF THE PROCEEDINGS WERE DAMAGED, WHERE THE SPECTACLE AND ITS HANDLING DEPRIVED MR. MONTEZ OF EVEN THE POSSIBILITY OF A FAIR TRIAL. EXACERBATING THE DAMAGE FURTHER, THE SPECTACLE WAS FROM A WITNESS OF WHOSE ALLEGATIONS MR. MONTEZ WAS ACQUITTED. A NEW TRIAL WITHOUT THESE HIGHLY PREJUDICIAL THEATRICS IS THE FAIR AND JUST REMEDY.

ISSUE IV:

A. Write the issue exactly as it was phrased in the Court of Appeals brief.

MR. MONTEZ WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR APPEALED TO THE JURY'S SYMPATHIES AND SENSE OF CIVIC DUTY IN CLOSING ARGUMENT. THE TRIAL COURT ERRED IN DENYING MR. MONTEZ'S MOTION FOR A MISTRIAL AND FAILING TO DO ANYTHING TO ADDRESS THE ERROR.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☑ 2. The issue raises a legal principle that is very important to Michigan law.
- ☑ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.

AN INSTANCE OF PROSECUTORIAL MISCONDUCT TOOK PLACE WHEN THE PROSECUTOR IMPLIED THAT THE JURY MEMBERS, IF THEY DIDN'T BELIEVE THE COMPLAINANTS' STORIES, WOULD BE "REVICTIMIZING" THEM, THUS SKEWING THEIR IMPARTIALITY WITH IMPLICIT ACCUSATION AND SHAME. IN ADDITION, THE PROSECUTOR SUBJECTIVELY VILIFIED MR. MONTEZ BY SAYING HIS ALLEGED CRIMES WERE "EVIL" AND "WORSE THAN MURDER," CLEARLY APPEALING TO EMOTION RATHER THAN FACT. THE EMPLOYMENT OF THESE UNETHICAL TACTICS, AND THE COURT'S ABUSE OF DISCRETION IN DENYING A REQUESTED MISTRIAL, WARRANTS THE GRANTING OF A NEW, FAIR, TRIAL.

ISSUE V:

A. Write the issue exactly as it was phrased in the Court of Appeals brief.

INDIVIDUALLY AND/OR CUMULATIVELY, THE ABOVE CLAIMS ENTITLE MR. MONTEZ TO A NEW TRIAL.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☑ 2. The issue raises a legal principle that is very important to Michigan law.
- ☑ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.

THE ERRORS, INCLUDING THE TRIAL COUNSEL'S FAILURE TO CONSULT AN EXPERT WITNESS, THE COURT'S REFUSAL TO GIVE NECESSARY INSTRUCTION ON A CRITICAL CREDIBILITY ISSUE, THE JURY'S WITNESSING OF A SYMPATHY EVOKING EMOTIONAL DISRUPTION, AND THE PROSECUTOR'S IMPROPER ARGUMENT, TAKEN INDIVIDUALLY OR IN COMBINATION DENIED MR. MONTEZ HIS RIGHT TO A FAIR TRIAL.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (CONT.)

STEVEN LEE MONTEZ, APPELLANT COURT OF APPEALS NO. 353119

ISSUE VI:

A. THE INCLUSION OF IRRELEVANT INFORMATION, i.e. DESCRIPTIONS OF AND REFERENCES TO ACQUITTED CONDUCT, IN MR. MONTEZ'S PSIR IS ERRONEOUS. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT. THIS COURT SHOULD REMAND WITH INSTRUCTIONS TO CORRECT THE PSIR.

B. THE COURT SHOULD REVIEW THE COURT OF APPEALS DECISION ON THIS ISSUE BECAUSE:

- THE ISSUE RAISES A LEGAL PRINCIPLE THAT IS VERY IMPORTANT TO MICHIGAN LAW.

- AND -

- THE COURT OF APPEALS DECISION IS CLEARLY WRONG AND WILL CAUSE MATERIAL INJUSTICE TO ME.

C. EXPLANATION AS TO WHY THESE CHOICE (ABOVE) APPLY TO THIS ISSUE:

TRIAL COUNSEL'S FAILURE TO OBJECT TO INCLUSION OF ACQUITTED CONDUCT IN PSIR PREJUDICED MR. MONTEZ BY ALLOWING DESCRIPTIONS OF AND REFERENCES TO SAID CONDUCT TO REMAIN IN PSIR. THE SECOND, FOURTH, FIFTH, SIXTH, AND NINTH PARAGRAPHS OF PSIR MUST BE REMOVED IN ORDER TO MAINTAIN THE REPORT'S INTEGRITY AND ELIMINATE INACCURATE UNDERSTANDING AND IMPROPER CONCLUSIONS IN BEING REVIEWED BY MDOC AND THE PAROLE BOARD.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont).

_____, Appellant Court of Appeals No._____

(Print your name)

NEW ISSUE INSTRUCTIONS: If you want the Supreme Court to look at errors that were not raised in the Court of Appeals, check **Yes** in the checkbox below and answer parts **A, B,** and **C** for each new issue you raise. There are pages provided for 2 new issues. You may include more pages to raise additional new issues. If you do not have new issues, go to the Relief Requested section on page 10.

☐ YES, I want the Supreme Court to consider the additional grounds for relief contained in the following issues. The issues were not raised in my Court of Appeals brief.

NEW ISSUE I:

A. Write the new issue you want the Court to consider.

B. The Court should review this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
☐ 2. The issue raises a legal principle that is very important to Michigan law.
☐ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and citations, laws, or court rules, etc. that support your argument and explain how they apply to this issue. State the facts that support and explain this issue. If any facts were not presented in the Court of Appeals, explain why. You may add more pages.

_____, Appellant Court of Appeals No._____

(Print your name)

NEW ISSUE II:

A. Write the new issue you want the Court to consider:

B. The Court should review this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle that is very important to Michigan law.
- ☐ 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. Explain why you think the choices you checked in "B" apply to this issue. List any cases and citations, laws, or court rules, etc. that support your argument and explain how they apply to this issue. State the facts that support and explain this issue. If any facts were not presented in the Court of Appeals, explain why. You may add more pages.

RELIEF REQUESTED

9. For the above reasons I request that the Supreme Court grant my application for leave to appeal or order any other relief that it decides I am entitled to receive.

3-20-22
(Date)

(Sign your name)
STEVEN LEE MONTEZ 732213
(Print your name and, if incarcerated, MDOC number)
GUS HARRISON CORRECTIONAL FACILITY
(Print the name of the correctional facility if incarcerated)
2727 E. BEECHER ST.
(Print your address or address of the correctional facility)
ADRIAN MI 49221

After this page, you should attach copies of the trial court and Court of Appeals decisions being appealed and any other required documents, such as the PSIR or transcript of jury instructions (if the PSIR or transcript were not filed with the Court of Appeals).

LOWER COURT	Electronically Filed	CASE NO.
Kent County Circuit Court	BRIEF COVER PAGE	Lower Court 19-3225 FC Court of Appeals 353119

(Short title of case)

Case Name: **People v. Steven Lee Montez**

1. Brief Type (select one): ☒ APPELLANT(S) ☐ APPELLEE(S) ☐ REPLY ☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS ☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Steven Lee Montez**

3. ☐ This brief is in response to a brief filed on by .

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

   [See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

   - ☒ Table of Contents [MCR 7.212(C)(2)]
   - ☒ Index of Authorities [MCR 7.212(C)(3)]
   - ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
   - ☒ Statement of Questions [MCR 7.212(C)(5)]
   - ☒ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
   - ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
   - ☒ Relief Requested [MCR 7.212(C)(9)]
   - ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Maya Menlo**
   Signing Attorney's Bar No. [if any]: **(P 82778)**

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III. Mr. Montez was denied a fair trial where the complaining witness had an emotional breakdown and her loved ones rushed to the witness stand to comfort her in front of the jury, and the trial court did nothing to cure the error. 20

IV. Mr. Montez was denied a fair trial when the prosecutor appealed to the jury's sympathies and sense of civic duty in closing argument. The trial court erred in denying Mr. Montez's motion for a mistrial and failing to do anything to address the error. 25

V. Individually and/or cumulatively, the above claims entitle Mr. Montez to a new trial. 32

VI. The inclusion of irrelevant information, i.e. Descriptions of and references to acquitted conduct, in Mr. Montez's PSIR is erroneous. Trial counsel was ineffective for failing to object. This Court should remand with instructions to correct the PSIR. 32

VII. Imposition of lifetime electronic monitoring (LEM) violated the Ex Post Facto Clauses of the United States and Michigan Constitutions, Mr. Montez's right to a jury trial, and Mr. Montez's due process rights. Remand with instructions to strike LEM is required. 37

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Statement of Jurisdiction

Steven Lee Montez was convicted in the Kent County Circuit Court by jury trial, and a Judgment of Sentence was entered on February 11, 2020. A Claim of Appeal was filed on March 12, 2020 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated March 4, 2020, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

Statement of Questions Presented

I. Was trial counsel ineffective for failing to consult or call an expert witness to rebut the prosecution's expert witness regarding child sexual abuse disclosure and treatment?

Trial Court made no answer.

Steven Lee Montez answers, "Yes."

II. Was Mr. Montez denied a fair trial when the prosecutor improperly characterized Thomas Cottrell's expert testimony as corroboration of the complainants' stories? Further was the trial court's refusal to give a curative instruction reversible error?

Trial Court answers, "No."

Steven Lee Montez answers, "Yes."

III. Was Mr. Montez denied a fair trial where the complaining witness had an emotional breakdown and her loved ones rushed to the witness stand to comfort her in front of the jury, and the trial court did nothing to cure the error?

Trial Court made no answer.

Steven Lee Montez answers, "Yes."

IV. Was Mr. Montez denied a fair trial when the prosecutor appealed to the jury's sympathies and sense of civic duty in closing argument? Did the trial court err in denying Mr. Montez's motion for a mistrial and failing to do anything to address the error?

Trial Court answers, "No."

Steven Lee Montez answers, "Yes."

V. Individually and/or cumulatively, do the above claims entitle Mr. Montez to a new trial?

Trial Court made no answer.

Steven Lee Montez answers, "Yes."

VI. Is the inclusion of irrelevant information, i.e. descriptions of and references to acquitted conduct, in Mr. Montez's PSIR is erroneous? Was trial counsel ineffective for failing to object?

Trial Court made no answer.

Steven Lee Montez answers, "Yes."

VII. Did imposition of lifetime electronic monitoring (LEM) violate the Ex Post Facto Clauses of the United States and Michigan Constitutions, Mr. Montez's right to a jury trial, and Mr. Montez's due process rights?

Trial Court made no answer.

Steven Lee Montez answers, "Yes."

Statement of Facts

Charles Putnam emailed himself a nude photo of his girlfriend's minor daughter. T III, 138-139; T IV, 56-57. Charles, his girlfriend, and her teenaged children all lived together at the time. T III, 91, 138; T IV, 8. CPS opened an investigation into Charles' conduct. T IV, 56-57.

During the CPS investigation, the children were asked about any other inappropriate sexual conduct. T IV, 58. One of the teens, Alana, told CPS that her mother's former boyfriend, Steven Montez, had raped her approximately 14 years ago when she was five years old. T III, 138, 143. Alana told her sibling, Noah[1], that she would not press charges against Mr. Montez without Noah's help. T III, 148-150. Noah subsequently reported allegations against Mr. Montez so that Alana would not have to go through the process alone. T III, 93, 98.

The police became involved in investigating the allegations against Mr. Montez and he was charged with one count of CSC-I for vaginal penetration of Alana and one count of CSC-1 for oral penetration of Noah. T II, 27-28; T III, 133, 149. A jury acquitted Mr. Montez of the former and convicted him of the latter. T V, 103-104. CPS closed the investigation of Charles Putnam without action. T IV, 61. Charles still lives with his girlfriend and her children. T III, 91, 138; T IV, 8.

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[1] Noah, who was named Allea Eickhoff at birth, now goes by the first name Noah and uses the singular they/them pronouns (rather than she/her). T III, 61, 148; T IV, 3.

Mr. Montez was in a relationship with Alana and Noah's mother, Angel, for several years. T IV, 9-10. Mr. Montez, Angel, Alana, and Noah lived together in Mr. Montez's house from approximately 2004 until 2008, when the children were in preschool and elementary school. T III, 64, 66; T IV, 6-7. Mr. Montez and Angel "had a lot of problems" and eventually broke up. T IV, 18, 35-36.

Mindy, one of Mr. Montez's nieces, approached Angel in 2008. T II, 67; T IV, 18-20. Mindy told Angel that Mr. Montez had sexually abused her and that "there were other victims." T II, 67; T IV, 18-20.

In 2008, after speaking with Mindy, Angel moved out of the home she shared with Mr. Montez, taking her children with her. T IV, 18-20. Around the same time, another of Mr. Montez's nieces, Jessica, made similar comments to Angel. T II, 135; T IV, 22-23.[2]

After Mr. Montez was out of their lives, Angel asked Alana and Noah whether Mr. Montez had ever touched them inappropriately; they answered that he had not. T III, 90; T IV, 23. Angel's friend, Spring, separately questioned Alana and Noah if anyone had ever touched them inappropriately. T IV, 23. They answered no. T IV, 23.

In 2014, Angel found messages on Noah's cell phone indicating that Noah had been abused in the past. T III, 76, 90; T IV, 23-24. Angel and Noah decided not to report the alleged abuse to the police at that time. T IV, 25.

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[2] Three of Mr. Montez's nieces—Mindy, Jessica, and Elizabeth—testified at trial as other-acts witnesses. T II, 48, 98; T III, 4.

At the time of Mr. Montez's trial in 2019, Alana and Noah were adults. T III, 60. Alana testified that, in 2018, she was "messing around" sexually with her boyfriend, Alec, when a memory came flooding back to her. T III, 131-132. Alana suddenly remembered Mr. Montez laying on top of her and putting his penis in her vagina one night when she was five years old. T III, 124-128. Alana told Alec about what she remembered but did not tell anyone else at that point. T III, 112, 133, 138.

At the time of trial, Angel was in a long-term domestic relationship with Charles Putnam. T III, 91, 138; T IV, 8. Charles, Angel, Allea, and Alana all live together. T III. 91; T IV, 8. Child Protective Services (CPS) opened an investigation because Charles emailed himself a nude photo of Alana. T III, 138-139. Alana took a nude photo to send to her boyfriend; Charles found the photo on her cell phone and sent it to himself. T III, 151-152.

Alana testified that she was fearful of Charles and did not want to report the photo incident. T III, 157. Alana did not know how CPS got involved. T III, 138. A CPS worker met with Alana at Alana's school to discuss this incident involving Charles. T III, 140. In addition to discussing what Charles had done with the nude photo, the CPS worker who interviewed Alana asked her if anyone else had touched her inappropriately. T IV, 58. Alana told the CPS worker about her memory of Mr. Montez raping her when she was five years old. T III, 133.

Alana recalled her mother, Angel, telling her and Noah that they moved out of Mr. Montez's home because Mr. Montez was a bad person and it was not safe for them to be around him. T III, 155-156. Alana also recalled that, shortly after they moved

out of Mr. Montez's house in 2008, her mother told her that Mr. Montez had done inappropriate things. T III, 146. Alana knew there were other allegations against Mr. Montez. T III, 147.

After CPS talked with Alana, the police began an investigation. T III, 133, 149. Alana told Noah that she would not press charges against Mr. Montez without Noah's help. T III, 149. Alana told the police, "I wouldn't press charges without my sister [Noah]." T III, 134. Noah then came forward with allegations against Mr. Montez. T III, 98, 135. Noah explained that they were present in court because, "I didn't want my sister to go through this alone." T III, 82.

Noah testified that, on several occasions, Mr. Montez gave Noah candy in exchange for fellatio. T III, 73. Noah also described that Mr. Montez told Noah to put their hands on his penis. T III, 72-73. Noah was in elementary school at the time. T III, 68. Noah could not remember the first time any of this happened, how many times it happened, or how they felt when it was happening. T III, 70, 76, 83.

Thomas Cottrell testified for the prosecution as an expert in child sexual abuse disclosure and treatment. T IV, 85. He had never met or spoke with anyone involved in the case. T IV, 73, 101. He testified that there is a common misperception that children will disclose sexual abuse immediately, but in fact upwards of 69 percent of disclosures of child sexual abuse are delayed. T IV, 86-87. He also testified that children can be coached into stating falsehoods and can store falsehoods as their own memories. T IV, 106, 109.

During closing argument, the prosecutor told the jury that Mr. Cottrell's expert testimony "corroborated" the complainants' stories. T V, 38-39. Trial counsel objected and requested a curative instruction to help the jury understand that Mr. Cottrell's testimony did not "corroborate" the complainants' stories given that he had no knowledge of their testimony or the alleged incidents underlying this case. T V, 49-50. The trial court overruled trial counsel's objection and declined to give such an instruction. T V, 51-53.

Also in closing, the prosecutor suggested the allegations against Mr. Montez were worse than the crime of murder, T V, 23; said his actions were "evil" and that "it doesn't get much worse", T V, 49; and implied the jury would be 'revictimizing' the complainants unless it believed their stories. T V, 70-71.

The jury acquitted Mr. Montez of CSC-I count for vaginal penetration of Alana and convicted him of the CSC-I count for oral penetration of Noah. T V, 102-103.

At sentencing, the trial court, the prosecution, and the defense all acknowledged that Mr. Montez was not subject to the now-mandatory 25-year minimum sentence for CSC-I under MCL 750.520b(2)(b), which became effective on August 28, 2006. ST, 6-7, 17. This is because the prosecution did not establish any CSC-I occurred after the statute's effective date. ST, 6-7, 17.

Mr. Montez's guidelines were calculated at 108 to 180 months (15 years). ST, 6. The trial court sentenced Mr. Montez to 15 to 50 years in prison—the top of his guidelines. ST, 21-23. The trial court did not address the issue of lifetime electronic monitoring (LEM) on the record at sentencing or at any other time, but issued a

judgment of sentence that sentenced Mr. Montez to LEM. *Judgment of Sentence*, attached.

Argument

I. Trial counsel was ineffective for failing to consult or call an expert witness to rebut the prosecution's expert witness regarding child sexual abuse disclosure and treatment.

Issue Preservation

Counsel has filed a concurrent motion to remand raising this issue. MCR 7.211(C)(1).

Standard of Review

Both the Michigan and the United States Constitutions guarantee Mr. Montez the effective assistance of counsel. Const 1963, art 1, § 20; US Const, Am VI. Constitutional questions and ineffective assistance of counsel issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579 (2002).

In order to obtain a new trial, Mr. Montez must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability the outcome would have been different. *People v Armstrong*, 490 Mich 281, 290 (2011); see also *People v Pickens*, 446 Mich 298 (1994) (adopting the federal constitutional standard set forth in *Strickland v Washington*, 466 US 668 (1984)).

Discussion

Thomas Cottrell, a Licensed Social Worker who is the Chief Programming Officer for the YWCA of West Central Michigan, testified for the prosecution as an expert regarding child sexual abuse disclosure and treatment. T IV, 69-70, 83. Trial counsel had notice six months before trial that the prosecution planned to call Mr.

Cottrell to testify. T IV, 76-77. Trial counsel considered calling an expert witness to challenge Mr. Cottrell's testimony, particularly an expert who could testify regarding false memories in children. *Statement of Attorney Maya Menlo*, attached. Trial counsel "asked around" but was not able to get the name of an expert, and ultimately did not call an expert witness or consult with an expert in preparing Mr. Montez's defense. *Id.*

Counsel's performance may be constitutionally deficient if counsel fails to perform investigations relevant to the defense. *People v Trakhtenberg*, 493 Mich 38, 51-52 (2012). This includes investigations relevant to expert testimony produced by the prosecution. See *People v Ackley*, 497 Mich 381, 389-394 (2015). Here, trial counsel was aware that an expert witness could assist in Mr. Montez's defense, but did not locate an expert. Trial counsel could have contacted the State Bar of Michigan, the Criminal Defense Attorneys of Michigan, or the State Appellate Defender Office for an expert witness referral. Trial counsel's failure to call or consult an expert witness constituted deficient performance and prejudiced Mr. Montez.

Had counsel called an expert witness to testify for the defense, the expert would have been able to rebut Mr. Cottrell's testimony, which supported the prosecution's theory that the complainants' memories were consistent with events that actually occurred and that their delayed disclosures did not detract from their credibility. *Affidavit of Dr. David Thompson*, attached.[3] Consultation with an expert

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[3] Dr. Thompson is a clinical and forensic psychologist who has been licensed for 33 years. Dr. Thompson's curriculum vitae is attached to his affidavit.

was also necessary for trial counsel to prepare to effectively cross-examine Mr. Cottrell and to present evidence to support the defense theory.

If trial counsel had consulted with an expert, she would have been prepared to point out numerous flaws in Mr. Cottrell's testimony. *Affidavit of Dr. David Thompson*, attached. Dr. David Thompson reviewed Mr. Cottrell's testimony from trial and identified several areas in which Mr. Cottrell's conclusions contradicted relevant research:

- Mr. Cottrell's statement that upwards of 69% of child sexual assault disclosures are delayed exaggerates the frequency of delayed disclosure.
- Mr. Cottrell's testimony that trauma produces disjointed memories is patently incorrect: people recall traumatic memories more fully and completely than non-traumatic memories.
- Mr. Cottrell inaccurately stated false memories require a deliberate process such as coaching to form in a child's mind, and such memories fade quickly. In fact, false memories can form on their own. Dr. Thompson would have testified that he is aware of no evidence that false memories fade more quickly than other memories.

Affidavit of Dr. David Thompson, attached.

In short, Mr. Cottrell inaccurately testified that more than 69 percent of child sexual abuse disclosures are delayed; that trauma produces disjointed memories; and that false memories require deliberate coaching and fade quickly over time. Trial counsel performed deficiently by failing to rebut these claims. Had counsel performed effectively, there is a reasonable probability the jury would have acquitted Mr. Montez of both counts.

Mr. Cottrell's inflated statistic that "upwards of 69 percent[]" of child sex abuse victims report the abuse only after they are adults suggested that the complainants were among a large majority of child abuse victims who delay reporting. T IV, 21. In reality, about half of alleged child sex abuse is reported close in time to the abuse; the other half of disclosures are delayed. *Affidavit of Dr. David Thompson*, attached. This difference would have mattered to the jury as they determined whether the complainants' delayed reports were accurate. Mr. Cottrell exaggerated the frequency of delayed disclosure, leading the jury to improperly conclude that the complainants' allegations were consistent with the large majority of child sexual abuse victims, which lent credence to their stories. Trial counsel did nothing to challenge this inflated statistic.

Mr. Cottrell's incorrect statement that traumatic memories are disjointed served the prosecutor's theory by explaining away Noah's inability to recall the first time the abuse occurred, how old they were when the other incidents occurred, how many times it happened, or how they felt when it was happening. The prosecutor repeatedly relied on Mr. Cottrell's testimony in closing, arguing the complainants' recollections of the alleged abuse were incomplete because memories of traumatic events are disjointed. T V, 18, 19, 20, 21, 39. However, research indicates memories of traumatic events are generally more fully and completely recollected than memories of non-traumatic events. *Affidavit of Dr. David Thompson*, attached. If defense counsel had presented expert testimony to this effect, the jury would have given more weight to the defense's argument that the complainants' stories could not

be believed. But trial counsel failed to challenge this aspect of Mr. Cottrell's testimony.

Mr. Cottrell's testimony that false memories require deliberate coaching and fade quickly over time supported the prosecution's theory that the complainants' memories were accurate. Scientific research indicates the exact opposite: false memories can be created easily in children, without any prompting or coaching by adults, and children recall false memories as if the events were real. *Affidavit of Dr. David Thompson*, attached.

Mr. Cottrell testified that false memories are not accompanied by emotion when recollected. T IV, 110. The prosecutor relied on this statement to argue that, since the complainants were emotional in court, the jury should believe them. T V, 40. But research indicates that children are completely convinced the falsely remembered events occurred, and so retell them with enthusiasm and emotions similar to children reporting events that actually occurred. *Affidavit of Dr. David Thompson*, attached. This evidence would have been critically important to Mr. Montez's defense, but was not presented. On cross-examination, trial counsel asked Mr. Cottrell whether, in general, it is possible to create false memories. T V, 107, 110. Trial counsel did not confront him with research on how easily false memories can form in children or otherwise challenge his claim that false memories only form in cases involving deliberate coaching.

By pointing out the ways in which Mr. Cottrell's testimony conflicted with scientific literature, a defense expert would have cast doubt on the entirety of Mr.

Cottrell's testimony. Had the jury heard that several of Mr. Cottrell's opinions were unsupported by science, they would have had reason to distrust the rest of his testimony.

In addition to rebutting Mr. Cottrell's testimony, a defense expert could have also presented evidence to support the defense theory that the complainants' childhood memories were unreliable. A defense expert could have presented research regarding false memories (or "source misattribution errors") in children. When such an error occurs, the child is fully convinced she is telling the truth. Source misattribution errors can occur as a result of overhearing other people's conversations or participating in therapeutic treatment. *Affidavit of Dr. David Thompson*, attached. There was evidence presented that both complainants in this case were aware of prior allegations against Mr. Montez, T III, 93, 147; and that Noah was participating in therapy. T IV, 24.

Further, research indicates that repeated conversations about events that did not occur can lead to source misattribution errors in children. Family influence can also lead to such errors. *Affidavit of Dr. David Thompson*, attached. Here, both complainants were questioned on at least two occasions in 2008 or 2009—by their mother and by their mother's friend—about whether Mr. Montez had abused them. T III, 89; T IV, 23, 41-42. The complainants' mother also made comments to them about Mr. Montez: Alana testified that her mother told her Mr. Montez had done inappropriate things, that there had been an investigation of Mr. Montez abusing other girls, and that Mr. Montez was a bad person. T III, 146, 156. Alana and Noah

complainants denied any abuse by Mr. Montez when asked as children, but then made disclosures as young adults. An expert would have helped trial counsel demonstrate that questioning and family influence could have led to source misattribution errors in this case.

A defense expert could have also testified about co-witness conformity—where witnesses experience two different events, but incorrectly remember the same or similar events after talking with one another about their experiences. *Affidavit of Dr. David Thompson*, attached. This testimony would have supported the defense's theory of the case. Both Alana and Noah testified that they had spoken with one another about the allegations. T III, 79, 133, 149-150. Noah agreed to participate in proceedings because Alana said she would not come forward without Noah, and Noah did not want Alana to go through the process alone. T III, 82, 148-150.

If counsel had properly challenged Mr. Cottrell's testimony by consulting a defense expert to prepare for cross-examination and by presenting a defense expert's testimony, there is a reasonable probability that the jury would have acquitted Mr. Montez of both counts. A jury's decision to acquit of one count and convict of another may indicate the jurors question the credibility of the prosecution's case and are reaching a compromise of sorts. See *People v Shafier*, 483 Mich 205, 215-216 (2009). The prosecution's case would have been considerably weaker if trial counsel had investigated properly and called an expert witness.

Mr. Montez is entitled to a new trial, or, in the alternative, a remand to the trial court for a hearing on trial counsel's effectiveness under *People v Ginther*, 390

Mich 436 (1973). To the extent counsel's errors are apparent on the record, Mr. Montez's convictions must be vacated. In the alternative, if this Court does not feel it can grant relief on the existing record, Mr. Montez is entitled to a remand. MCR 7.211(C)(1)(a). Mr. Montez moved for a remand on this issue, so if the remand has not already been granted, this Court must grant it now to be able to fairly rule on this issue. *Id.*

Given the significant errors in Mr. Cottrell's testimony, a *Daubert* hearing is necessary upon retrial to determine whether the proposed testimony is both relevant and reliable as is required under MRE 702. See *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993); see *People v Tomasik*, 498 Mich 953 (2015) (granting Mr. Tomasik a new trial on grounds unrelated to Mr. Cottrell's testimony and therefore declining to reach that issue, but nevertheless ordering a *Daubert* hearing if such testimony is offered upon retrial).

II. Mr. Montez was denied a fair trial when the prosecutor improperly characterized Thomas Cottrell's expert testimony as corroboration of the complainants' stories. Further the trial court's refusal to give a curative instruction was reversible error.

Issue Preservation

Trial counsel's objection and motion for a curative instruction preserved this issue. Following the prosecutor's closing argument, trial counsel made the following argument outside the presence of the jury:

> ...I'm objecting to [the prosecutor's] characterization of Mr. Cottrell's testimony as corroboration. She indicated in argument that a victim's testimony alone is enough, but you have other things that corroborate it. You have Mr. Mosher's testimony, you have Mr. Cottrell's testimony, and then she went into Mr. Cottrell's testimony. We all know that there's a danger, particularly in our communities where Mr. Cottrell testifies about him being an improper credibility booster. A case was overturned in Allegan County[4] based on Mr. Cottrell's testimony and the fact that he is used to improperly boost credibility.
>
> To characterize his testimony as corroboration implies to the jury that all of these things, behaviors that the girls were exhibiting means they were telling the truth because she's saying it's corroborating their story. It's not. It's merely behavior that's present in potential other victims of sexual abuse. So by saying it's corroboration, we're walking that fine line, and kind of, frankly, I think stepped over that line into a place where now we're saying his testimony is corroborating their testimony when it simply is not, and that's improper credibility boosting.
>
> Part of me thinks that it might -- I don't think it's an incurable issue, but I think the Court needs to instruct the jury I believe before I close that his testimony is not corroboration. His testimony is to be taken as

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[4] Trial counsel was presumably referencing *People v Thorpe*, 504 Mich 230 (2019), in which the Michigan Supreme Court granted a new trial on the grounds that Mr. Cottrell's testimony regarding the percentage of child complainants who lie about sexual abuse improperly vouched for the complainant's credibility.

> expert testimony as it's supposed to be, but it is not corroboration of Alana and Allea's testimony. T V, 49-50.

The trial court denied trial counsel's motion. T V, 51-53.

Standard of Review

Preserved issues of prosecutorial error are reviewed de novo on a case by case basis, examining the remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 (1995); *People v Aldrich*, 246 Mich App 101, 110 (2001).

This Court reviews de novo a trial court's decision whether to give a special jury instruction. *People v Herndon*, 246 Mich App 371, 421 (2001), citing *People v Hubbard (After Remand)*, 217 Mich App 459, 487 (1996). Instructional error is reversible if it is "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496 (1999).

Discussion

The prosecutor argued in closing that Mr. Cottrell's expert testimony "corroborated" the complainants' stories. T V, 38-39. Trial counsel objected that this was improper argument since Mr. Cottrell's testimony did not corroborate the complainants' stories given that he had no knowledge of their testimony or the alleged incidents underlying this case. T V, 49-50. Trial counsel requested a curative instruction. T V, 50. The trial court overruled trial counsel's objection and declined to give a curative instruction. T V, 51-53. The trial court's ruling is not entitled to deference on appeal; review of this issue is de novo. *Herndon*, 246 Mich App at 421.

Merriam-Webster defines "corroborate" as follows: "to support with evidence or authority".[5] The Dictionary defines "vouch" as "to supply supporting evidence or testimony".[6] In *People v Thorpe*, 504 Mich 230 (2019), the Michigan Supreme Court reversed and remanded for a new trial because Mr. Cottrell's general testimony regarding the percentage of children who lie about sexual abuse improperly "vouched" for the complainant's credibility.[7]

Since it is reversible error for Mr. Cottrell to testify in a manner that vouches (i.e. "suppl[ies] supporting evidence or testimony") for a complainant's credibility, it is likewise reversible error for a prosecutor to argue that Mr. Cottrell's testimony corroborates (i.e. "support[s] with evidence or authority") the complainants' testimony. By arguing that Mr. Cottrell's testimony corroborates the complainants' stories, the prosecutor used his testimony to vouch for their credibility.

The prosecutor's words and the definition of the word "corroborate" make clear that vouching occurred here. In response to trial counsel's objection, the prosecutor explained, "I was going through the evidence and showing what could corroborate what [the complainants] said." T V, 51. The argument that Mr. Cottrell's testimony corroborated the complainants' testimony was improper and denied Mr. Montez a fair trial. Reversal is required.

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[5] Merriam-Webster Online Dictionary (2021) <https://www.merriam-webster.com/dictionary/corroborate> (accessed March 2, 2021).

[6] Merriam-Webster Online Dictionary (2021) <https://www.merriam-webster.com/dictionary/vouch> (accessed March 2, 2021).

[7] *Thorpe* was decided July 11, 2019. Mr. Montez's trial began on December 2, 2019.

The harm to Mr. Montez was particularly significant given the trial court's refusal to give a curative instruction, which itself constituted reversible error.

Importantly, the trial court in *Thorpe* gave a special jury instruction:

> You have heard Thomas Cottrell's opinion about the behavior of sexually abused children. You should consider that evidence only for the limited purpose of deciding whether [BG]'s acts and words after the alleged crime were consistent with those of sexually abused children. That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered an opinion by Thomas Cottrell that [BG] is telling the truth. [*Thorpe*, 504 Mich at 242.]

The Michigan Supreme Court nevertheless held the content of Mr. Cottrell's testimony was reversible error. In Mr. Montez's case, where the vouching error was in the prosecutor's argument rather than Mr. Cottrell's testimony, Mr. Montez's trial counsel argued the error was curable and requested a special instruction like that given in *Thorpe*. But the court refused to give one. Since the prosecutor made an improper argument that boosted the complainants' credibility, it was reversible error for the trial court not to give a curative instruction. Had the trial court properly instructed the jury that Mr. Cottrell's testimony did not corroborate the complainants' testimony, it is more probable than not that the jury would have acquitted Mr. Montez of both counts rather than acquitting him of just one.

Errors are intrinsically prejudicial when they lend credence to one side's story in a case where credibility is paramount. See *People v Anderson*, 446 Mich 392, 407, n 37 (1994); *People v Gee*, 406 Mich 279 (1979). The prosecution's case against Mr. Montez turned on the complainants' credibility. There was no physical evidence, witnesses to the alleged assaults, or inculpatory statements.

The trial court gave the standard jury instruction that "[t]he lawyers' statements and arguments...are not evidence." T V, 81; see M Crim JI 3.5. While "it is presumed the jury followed [the] instructions of the trial court when it deliberated defendant's guilt," *People v Matuszak*, 263 Mich App 42, 58 (2004), the trial court's recitation of the standard instruction does not render the error harmless. This was not a curative instruction—it was not given in lockstep with the error committed. This makes the instruction less impactful than a pointed, real-time instruction would have been. *People v Grayer*, 252 Mich App 349, 358 (2002) (finding any error harmless where "the prosecutor told the jury that they should listen to only what the judge says is the law and not what attorneys argue" following the defendant's objection).

The standard instruction is not designed to cure case-specific errors; it is designed to be applicable to every criminal case, including those where no errors occur. Here, trial counsel objected to a particular error and requested a curative instruction specific to that error. The error was not sufficiently cured by the standard jury instruction. The prosecutor's corroboration argument itself denied Mr. Montez a fair trial. The trial court's failure to give a curative instruction compounded the harm caused by the prosecutor's argument and on its own constituted reversible error.

Mr. Montez is entitled to a new trial.

III. Mr. Montez was denied a fair trial where the complaining witness had an emotional breakdown and her loved ones rushed to the witness stand to comfort her in front of the jury, and the trial court did nothing to cure the error.

Issue Preservation

This issue is unpreserved. A record was not made of the incident. The affidavit of Attorney A'ndreanna Vanden Berg, who was trial counsel's intern at the time of trial, is offered to explain what transpired. *Affidavit of A'ndreanna Vanden Berg*, attached.

Standard of Review

Unpreserved errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750 (1999).

Discussion

While complainant Alana was testifying, she began to cry and appeared to have difficulty completing her sentences. T III, 126-127. The prosecutor asked Alana, "Do you need your medicine?" and inquired whether the medicine was in Alana's purse. T III, 127. Alana's boyfriend Alec and her sibling Noah, both of whom had previously testified for the prosecution, rushed from the gallery to the witness stand to comfort Alana. *Affidavit of A'ndreanna Vanden Berg*, attached. Alana's boyfriend held her hand and Noah stood near Alana while Alana still sat in the witness chair. *Id.* Noah then ran back to the gallery, retrieved Alana's inhaler, and brought it to Alana. *Id.* This occurred in the presence of the jury, approximately five feet away from the jury box. *Id.*

The trial court then sent the jury out for a recess. T III, 127. As the jurors filed out, some continued to watch Alana and her loved ones gathered at the witness stand. *Affidavit of A'ndreanna Vanden Berg*, attached. After the recess, the jury reentered and the prosecutor resumed direct examination of Alana. T III, 127. The court did not question the jurors to make sure they could still be impartial, nor did the trial court offer to give a curative instruction.

The scene of Alana's loved ones rushing to comfort her roused the sympathies of the jury and denied Mr. Montez a fair trial. The Sixth Amendment guarantees Mr. Montez a right to a fair trial by an impartial jury. *People v Budzyn*, 456 Mich 77, 88; (1997); *Williams v Bagley*, 380 F3d 932, 943 (CA 6, 2004) (citing *Morgan v Illinois*, 504 US 719, 726–27 (1992)). Certain disruptions during trial may affect the impartiality of the jury. In such cases, the inquiry is "whether there has been 'an impingement upon the right of the appellant to be tried before a fair and impartial jury.'" *United States v Black*, 369 F3d 1171, 1177 (CA 10, 2004), quoting *United States v Evans*, 542 F2d 805, 815 (CA 10, 1976).

When a disturbance occurs, a trial court should take steps to determine whether the disturbance affected jurors' ability to be fair and impartial, and should offer to give a curative instruction. In both *Black* and *Evans*, the trial court questioned the jury to determine if their impartiality had been affected by the incidents. *Black*, 369 F3d at 1177; *Evans*, 542 F2d at 815.

In *Stewart v Wolfenbarger*, 468 F3d 338, 349 (CA 6, 2006), there was a disturbance outside the courtroom but still in the presence of the jury, where the

family of the decedent accused the defendant of murdering the decedent. The trial court judge instructed the jury that "while some people believed Petitioner murdered the victim, such belief was not evidence." *Id.* The trial court also asked the jurors whether they could remain fair and impartial even after seeing the disturbance. *Id.* The trial court took steps to ensure that the right to trial by a fair and impartial jury was not jeopardized and the Sixth Circuit agreed it was not an abuse of discretion to deny the motion for a mistrial. *Id.* at 350.

In *People v Bauder*, 269 Mich App 174, 194-195 (2005), overruled in part on other grounds by *People v Martin*, 269 Mich App 174 (2020), there was a courtroom outburst by the victim's brother. Because "the trial court scrupulously acted to ensure that defendant's right to a fair and impartial trial was preserved," this Court found there was no abuse of discretion in denying a mistrial. *Id.* The trial court questioned the jurors two times about "their ability to disregard the outburst and to remain fair and impartial" and instructed the jury to disregard the outburst as it was not evidence. *Id.* at 195.

In *People v Gonzales*, 193 Mich App 263, 264 (1992), the testifying complainant made several outbursts while being cross-examined. The trial court gave a cautionary instruction to the jury. *Id.* at 266. This Court found the error was harmless given the hostile nature of the entire cross-examination, which was intertwined with defense counsel's trial strategy in that case. *Id.*

Here, the disruption was not the result of cross-examination by the defense; it occurred during direct examination. Once this error occurred, it was impossible to

guarantee Mr. Montez's right to a fair trial by an impartial jury without addressing the disruption with the jurors by questioning and instructing them. Mr. Montez is entitled to a new, fair trial, as guaranteed by the US and Michigan Constitutions. US Const, Ams VI, XIV; Const 1963, art 1, §14.

The trial court thus had an obligation to question the jurors about whether their ability to fairly and objectively evaluate the evidence was affected by Alana's emotional testimony and the disruption caused by her loved ones rushing to the witness stand to comfort her. The jury should have been instructed that this scene must not influence their deliberations or their verdict, and that they must not consider what occurred when evaluating the credibility of any witness.

The trial court abdicated its responsibility. Taking a recess did not cure the error; jurors were watching Alana as her loved ones comforted her while she still sat on the witness stand. *Affidavit of A'ndreanna Vanden Berg*, attached. The trial court did not question jurors to ensure fairness and impartiality, and no curative instruction was given. This is a plain error that cannot be erased. The disruption infected the environment in the courtroom by rousing the jurors' sympathies; it poisoned the well of Mr. Montez's trial.

The error seriously affected the fairness, integrity, and public reputation of the judicial proceedings. *Carines*, 460 Mich at 764, citing *United States v Olano*, 507 US 725, 736-737 (1993). Mr. Montez was convicted of a capital offense after his jury witnessed an emotional spectacle that the trial court failed to address. Alana was one of two complainants in this case. Her testimony was a major piece of the prosecutor's

evidence. Without her testimony, the prosecution could not have made its case against Mr. Montez—Alana's testimony was necessary to charge Mr. Montez with CSC against her, and to explain the timing of Noah's allegations.

Not only was Mr. Montez prejudiced by the error, but such errors also undermine the general public's confidence in the criminal legal system. Here, Mr. Montez was convicted and sentenced to lengthy prison term where there was no physical evidence, no witnesses to the alleged assaults, and no inculpatory statements but the trial court did permit a dramatic, emotional disturbance.

The trial court's recitation of the standard instruction advising jurors that they "must not let sympathy or prejudice influence your decision[]" did not cure the error. T V, 79; see M Crim JI 3.1(2). That instruction is designed to be applicable to all criminal cases and is given as a matter of course. It is not sufficient to cure errors caused by unusual disruptions like the one that occurred in this case. Here, a specific curative instruction—in addition to questioning the jurors—was required.

A jury's decision to acquit of one count and convict of another may indicate the jurors question the credibility of the state's case and are reaching a compromise of sorts. In *People v Shafier*, 483 Mich 205, 215-216 (2009), the Michigan Supreme Court found prejudice in the error alleged and reasoned that the jury's acquittal on the higher charges suggested some jurors questioned the credibility of the complainant. *Id.* The same can be said here, given the jury's acquittal of Mr. Montez on one of the CSC counts. That he was acquitted of the count regarding Alana does not render the error harmless. To the contrary, it suggests that, but for the errors that occurred

during trial, the jury may well have acquitted Mr. Montez of both counts.

The remedy is a new trial.

IV. Mr. Montez was denied a fair trial when the prosecutor appealed to the jury's sympathies and sense of civic duty in closing argument. The trial court erred in denying Mr. Montez's motion for a mistrial and failing to do anything to address the error.

Issue Preservation

Defense counsel objected and move for mistrial when the prosecutor implied that the jury would be 'revictimizing' the complainants if it did not believe their stories and convict Mr. Montez. T V, 70-75. The trial court denied trial counsel's motion for a mistrial. T V, 76.

Defense counsel did not object when the prosecutor suggested that sexual abuse is worse than the crime of murder. T V, 23. Likewise, defense counsel did not object when the prosecutor said in closing, "What he did was evil. It doesn't get much worse than abusing a child for your own sexual purposes, and I ask that you find him guilty." T V, 49.

Standard of Review

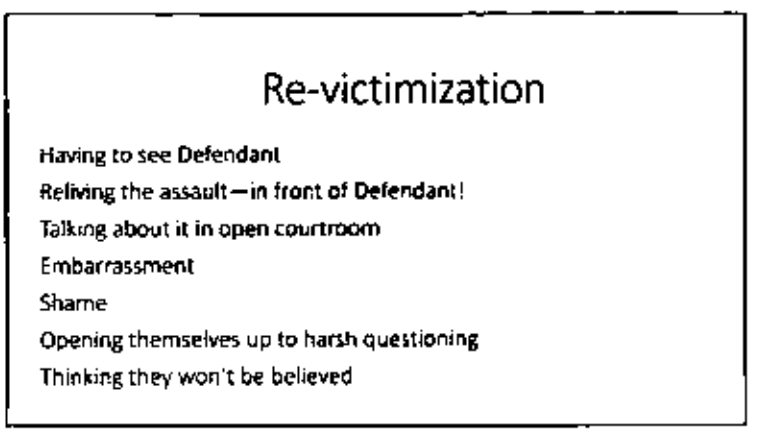
Issues of prosecutorial error are reviewed de novo on a case by case basis, examining the remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Duncan*, 402 Mich 1, 16 (1977); *People v Aldrich*, 246 Mich App 101, 110 (2001).

Appellate courts decide whether such misconduct denied the defendant a fair trial by evaluating each question in the context of a case's particular facts. *People v Duncan*, 402 Mich 1, 16 (1977); *People v Brown*, 267 Mich App 141, 152 (2005).

This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion, which occurs when a trial court chooses a result that is outside the range of reasonable and principled outcomes. *People v Cress*, 468 Mich 678, 691 (2003).

Prosecutor's Argument and Defense's Objection

During closing argument, the prosecutor argued that participation in the trial process was 'revictimizing' for the complainants and implied that the jury would be 'revictimizing' the complainants unless it believed their stories. T V, 70-71. The prosecutor made her point using a PowerPoint slide[8]:



Mr. Montez's trial counsel objected to the PowerPoint slide and the prosecutor's argument:

> It's implying in some way -- putting the burden putting a burden on the jury of regarding that they're being victimized by hearing they're not going to be believed in front of the very people that are making the decision.... it doesn't seem appropriate to argue that. [T V, 71.]

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[8] *Prosecution PowerPoint*, attached, at 33.

Trial counsel provided additional reasoning for her objection outside the presence of the jury, and moved for a mistrial:

> ...there was a slide that the prosecutor projected. She also said the words that the -- that witnesses were being revictimized by putting themselves through the court process which I think is problematic on its own. However, the most problematic part of that argument is the last line which, again, is on the slide that the prosecutor also said out loud, which is thinking that they won't be believed, thereby implying that if the jury doesn't believe them the jury is revictimizing them. And I think that's improper argument and borders on prosecutorial misconduct, and I'm making my objection.
> ...
> I don't know if there is a curative instruction, your Honor. I guess I don't understand how it's -- it's very clear to me that by saying that they're being revictimized by going through the court system and that one of the pieces of revictimization is the fear of not being believed, how that's not an implication that a not guilty verdict would revictimize somebody, I just don't under -- and I don't know how to fix it.
> ...
> And I guess it is I don't know how fix it, then it's incumbent on me to move for a mistrial because I think that's a problematic argument to be made. And if there's no way to fix it, then mistrial's the only way to go. [T V, 75-76.]

The court denied trial counsel's motion for a mistrial. T V, 76. The court did not question the jurors about whether they would be able to proceed impartially given the prosecutor's comments, nor did the trial court offer a curative instruction that the jury must not to consider the impact of the proceedings or the verdict on any person or party.

Also during closing argument, the prosecutor suggested the allegations against Mr. Montez were worse than the crime of murder:

> These kinds of crimes affect people for life. There's [sic] many crimes that are awful, right? There's murder, things like that,

> things that are bad, right? But in a murder, the victim – it's awful for the family and for everybody, right? But that victim doesn't have to live with it forever. These kids live with it forever, and we saw that here in court. [T V, 23.]

The prosecutor further labeled the alleged conduct "evil" and argued "it doesn't get much worse" than the allegations against Mr. Montez. T V, 49. Trial counsel did not object to these errors.

Discussion

Mr. Montez's due process right to a fair trial is violated when the prosecutor employs unfair tactics to gain an advantage. US Const, Ams V, XIV; Const 1963, art 1, §§ 17, 20; *Donnelly v De Christoforo*, 416 US 637, 642 (1974). It is the prosecutor's duty to seek justice, not merely a conviction, and it is her duty to seek a fair trial. *People v Farrar*, 36 Mich App 294, 299 (1971).

A prosecutor may not appeal to the jury to sympathize with the alleged victims. *People v Pickens*, 446 Mich 298, 336-337 (1994); MRE 403; *People v Wise*, 134 Mich App 82, 104 (1984). Likewise, it is improper for a prosecutor to appeal to the jury's civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment. *People v Bahoda*, 448 Mich 261, 282-283 (1995).

Where prosecutorial misconduct infringed Mr. Montez's right to a fair trial, the only reasonable and principled outcome is for a judge to grant a motion for a mistrial. Both the prosecutor and the judge committed reversible error.

The prosecutor here breached her duty to seek justice when she appealed to the jury's sense of sympathy and civic duty by making arguments about 'revictimization' and the severity of the charged crimes. The prosecutor argued

participating in the court process and the fear of not being believed was 'revictimizing' to the complainants. As trial counsel pointed out, this argument communicated to the jury that a not guilty verdict would 'revictimize' the complainants. This was improper because it invited the jury to convict Mr. Montez out of sympathy for the complainants and a desire to avoid causing them harm. It was the jury's responsibility to weigh the evidence and reach a true verdict; it was improper for the jury to consider the impact of the court proceedings on any person or party. Just as the jury is instructed not to consider possible penalty, i.e. the impact of their verdict on the defendant, the jury should not consider the potential impact of their verdict on the alleged victims. But the prosecutor's closing inviting the jury to consider the impact on the complainants. Such arguments "are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence of the charges and because they encourage the jurors to suspend their own powers of judgment." *People v Crawford*, 187 Mich App 344 (1991).

Not only was the prosecutor's 'revictimization' argument improper sympathy-mongering, but it was also based on facts not in evidence. *People v Stanaway*, 446 Mich 643, 686 (1994). The prosecutor argued that Alana and Noah were "thinking they won't be believed[]" and that this was something they "have to lose" by participating in the trial. T V, 70-71. But neither complainant testified that they feared not being believed. Alana testified that her memory of the alleged abuse only very recently surfaced, approximately 14 years after the incident allegedly occurred. Alana told her boyfriend, a CPS worker, and the police, all of whom believed her.

Noah had previously disclosed the alleged abuse but declined to speak to authorities about the allegations until Alana made her disclosure. Noah came forward out of a desire to support Alana. Noah's decision to talk to the police in order to support Alana suggests Noah had confidence their story *would* be believed and would help bolster Alana's credibility. Neither Alana nor Noah testified that they ever worried their claims would be disbelieved or even doubted. The prosecutor's argument that the complainants feared they would not be believed was unsupported by the evidence and significantly prejudiced Mr. Montez; reversal is required. *People v Davis*, 343 Mich 348, 357 (1955).

The prosecutor engaged in improper argumentation at additional points in her closing. The prosecutor suggested the allegations against Mr. Montez were worse than the crime of murder, T V, 23; labeled his actions "evil" and argued "it doesn't get much worse" than the case against Mr. Montez. T V, 49. It is well established that prosecutors may not resort to arguments that denigrate the defendant or appeal to the fears and prejudices of the jury members. *Bahoda*, 448 Mich at 282-283. The prosecutor improperly appealed to the jury's sense of civic duty by imploring them to convict an "evil" defendant whose crimes were worse than murder. Trial counsel did not object to these comments. But they, too, were improper arguments that denied Mr. Montez a fair trial—particularly in combination with the preserved errors.

Courts have found that a lack of direct evidence implicating the defendant is a significant factor suggesting that frequent instances of prosecutorial misconduct which occurred were not harmless. See, e.g. *People v Blackmon*, 280 Mich App 253,

257 (2008). The prosecution's case relied on the complainants' testimony. There was no physical evidence, witnesses to the alleged assaults, or inculpatory statements. Alana said she remembered an alleged event involving Mr. Montez from about 14 years prior, which she disclosed to CPS after she was questioned about an unrelated incident where her stepfather Charles emailed himself a nude photo of her. Alana's sibling, Noah, came forward with allegations against Mr. Montez to support Alana.

Given that the prosecutor's remarks denied Mr. Montez a fair trial, the trial court abused its discretion in denying trial counsel's motion for a mistrial. The error was particularly prejudicial since the trial court did not to address the error at all—the court did not question the jurors about whether they would be able to proceed impartially, nor did the court offer to give a curative instruction.[9] The trial court's inaction fell outside the range of reasonable and principled outcomes. A new trial should be granted.

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[9] Though a curative instruction would not have cured the error here, see *People v Humphreys*, 24 Mich App 411, 419-421 (1970), the harm caused by the error is exacerbated by the trial court's failure to do anything to address it.

V. Individually and/or cumulatively, the above claims entitle Mr. Montez to a new trial.

This Court should reverse Mr. Montez's convictions because the errors, whether taken individually or in combination, denied Mr. Montez his right to a fair trial. *People v LeBlanc*, 465 Mich 575, 591-592 (2002); *People v Bahoda*, 448 Mich 261, 292, n 64 (1995). Mr. Montez was not properly convicted where his trial attorney failed to consult an essential expert; the trial court refused to give a necessary instruction on a critical credibility issue; the jury witnessed an emotional disruption that evoked sympathy for a testifying complainant; and the prosecutor used improper argument to further rouse sympathy and appealed to the jury's sense of civic duty.

VI. The inclusion of irrelevant information, i.e. Descriptions of and references to acquitted conduct, in Mr. Montez's PSIR is erroneous. Trial counsel was ineffective for failing to object. This Court should remand with instructions to correct the PSIR.

Issue Preservation

Appellate counsel filed a concurrent motion to remand raising this issue. MCR 7.211(C)(1).

Standard of Review

The Michigan and the United States Constitutions guarantee Mr. Montez the effective assistance of counsel. Const 1963, art 1, § 20; US Const, Am VI. Constitutional questions and ineffective assistance of counsel issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579 (2002).

In order to obtain relief, Mr. Montez must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability the outcome would have been different. *People v Armstrong*, 490 Mich 281, 290 (2011).

Discussion

Mr. Montez is entitled to challenge the information contained in his PSIR. MCL 771.14(6); *People v Maben*, 313 Mich App 545, 555-56 (2015); MCR 6.425(D)(1)(b). "If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *People v Spanke*, 254 Mich App 642, 649 (2003); MCR 6.425(E)(2)(a).

The PSIR must include "a complete description of the offense and the circumstances surrounding it." MCR 6.425(A)(1)(b). The jury acquitted Mr. Montez of the CSC-I count concerning Alana. T V, 102. Yet, in Mr. Montez's PSIR, the Agent's Description of the Offense contains approximately 542 words about Alana's allegations—of which Mr. Montez was acquitted—before ever mentioning the conduct of which he was convicted. The second, third, fourth, fifth, and sixth paragraphs[10] of the Agent's Description must be removed as they bear no relevance to Mr. Montez's conviction. Further, the ninth paragraph[11] must be removed as it also references conduct of which Mr. Montez was acquitted. Trial counsel was ineffective for failing to object to these portions of the Agent's Description.

In *People v Beck*, 504 Mich 605 (2019), the Michigan Supreme Court held that a sentencing court cannot rely on acquitted conduct in sentencing a defendant. Here, *Beck* prohibited the trial court from relying on Alana's allegations, of which Mr. Montez was acquitted.[12] Had trial counsel challenged the portions of the PSIR regarding Alana's allegations, the trial court would have been required to state on

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[10] For purposes of clarity, these paragraphs begin as follows: Paragraph 2 of Agent's Description: "The victim, Alana..." ; Paragraph 3: "Detective Potts interviewed Alana at her school..."; Paragraph 4: "Alana stated that she did not remember a lot of details..."; Paragraph 5: "Alana stated she was about 5yrs old..."; Paragraph 6: "Detective Potts then interviewed Allea at her home...".

[11] This is the sixth full paragraph on the second page of the Agent's Description. It begins, "Allea stated she had no idea that her sister...".

[12] The Michigan Supreme Court decided *Beck* on July 29, 2019. Mr. Montez was sentenced on February 11, 2020.

the record that it was not relying on that conduct in sentencing Mr. Montez. Since the trial court could not rely on it, the acquitted conduct was irrelevant to sentencing and therefore the trial court was required to strike it from the PSIR. *Spanke*, 254 Mich App at 649. Like uncounseled convictions, acquitted conduct should not appear in the PSIR. See *People v Moore*, 391 Mich 426 (1974), relying on *United States v Tucker*, 404 US 443 (1972).[13] It was trial counsel's responsibility to object to errors in the PSIR that harm Mr. Montez. There was no strategic reason not to challenge the inclusion of acquitted conduct in the PSIR.

Trial counsel's failure to object pursuant to MCR 6.425(D)(1)(b) prejudiced Mr. Montez by allowing descriptions of and references to acquitted conduct to remain in his PSIR. At present, the reader would believe Mr. Montez was convicted of CSC against both Alana and Noah. This is incorrect and prejudicial to Mr. Montez. This Court has recognized the PSIR is a tool for the parole board in making release decisions. *Morales v Parole Bd.*, 260 Mich App 29, 48 (2003). The PSIR "follows the defendant to prison and may have ramifications for purposes of security classification and may be considered by parole officials at the appropriate time." *People v*

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[13] On August 20, 2020, this Court held that "a sentencing court may review a PSIR containing information on acquitted conduct without violating [*People v Beck*, 504 Mich 605 (2019)] so long as the court does not rely on the acquitted conduct when sentencing the defendant." *People v Stokes*, __ Mich App __ (2020) (Docket No. 348471; 348472). *Stokes* is pending on the application in the Michigan Supreme Court. The Court of Appeals in *Stokes* did not address whether acquitted conduct—upon which a sentencing court cannot rely—is therefore irrelevant and must be struck from the PSIR.

McAllister, 241 Mich App 466, 477 n 3 (2000) (citations omitted), remanded on other grounds, 465 Mich 884 (2001).

The second, third, fourth, fifth, sixth, and ninth paragraphs of Mr. Montez's PSIR must be removed so that the MDOC and the Parole Board have an accurate understanding of Mr. Montez's conviction. Mr. Montez is requesting that this Court remand his case to the trial court with instructions to remove all references to acquitted conduct from the PSIR.

VII. Imposition of lifetime electronic monitoring (LEM) violated the Ex Post Facto Clauses of the United States and Michigan Constitutions, Mr. Montez's right to a jury trial, and Mr. Montez's due process rights. Remand with instructions to strike LEM is required.

Issue Preservation

Appellate counsel filed a concurrent motion to remand raising this issue. MCR 7.211(C)(1).

Standard of Review

Whether Mr. Montez is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which this Court reviews de novo. *People v Osantowski*, 481 Mich 103, 107 (2008).

Discussion

The trial court's imposition of lifetime electronic monitoring (LEM) on Mr. Montez violated the Ex Post Facto Clauses of the United States and Michigan Constitutions where the prosecutor did not establish the offense occurred before the statute authorizing LEM took effect. The imposition of LEM also violated Mr. Montez's right to a jury trial, which requires each fact that aggravates his penalty to be found by a jury. Further, the trial court violated Mr. Montez's due process rights when it imposed LEM without providing him any notice or opportunity to be heard.

Ex Post Facto Violation

The requirement of lifetime electronic monitoring (LEM) for persons convicted of CSC-I took effect on August 28, 2006.[14] Ex post facto laws are constitutionally impermissible, US Const, art 1, § 10; Const 1963, art 1, § 10, and include any law that "increases the punishment for a crime" and is applied retroactively. *People v Earl*, 495 Mich 33, 37 (2014); see *Carmell v Texas*, 529 US 513, 522 (2000). The Michigan Supreme Court has held LEM constitutes an "additional punishment" that is part of a defendant's sentence. *People v Cole*, 491 Mich 325, 336 (2012). The Ex Post Facto Clauses of the United States and Michigan Constitutions prohibit the imposition of LEM where the prosecution has not established the offense occurred after August 28, 2006. *People v Freese*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2021 (Docket No. 350388), attached, pp 3-4; *People v Raffler*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 313683), attached, pp 3-4. When the imposition of LEM violates the Ex Post Facto Clauses, the remedy is for LEM to be struck. *Id.*

Here, the trial court, the prosecutor, and the defense acknowledged that the prosecution did not prove the offense occurred after August 28, 2006. ST, 6-7, 17. The parties therefore agreed Mr. Montez was not subject to the 25-year mandatory minimum. *Id.* The LEM amendment was likewise enacted by 2006 PA 169 and took

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[14] The Michigan Legislature added MCL 750.520b(2)(d) and MCL 750.520n to the penal code via Public Act 169 of 2006, effective August 28, 2006. Among other things, Public Act 169 imposed LEM for those convicted of CSC-I. See Senate Fiscal Agency, *Bill Analysis: CSC: Penalties & Elec. Monitoring*, https://www.legislature.mi.gov/documents/2005-2006/billanalysis/Senate/pdf/2005-SFA-0709-E.pdf

effect on August 28, 2006. ST, 6-7, 17.[15] Mr. Montez is not subject to LEM because the prosecution did not establish his conduct took place after August 28, 2006. When applied to Mr. Montez, the LEM statute violates the state and federal ex post facto prohibitions because it "applies to events that occurred before its enactment" and "disadvantages the offender." *People v Slocum*, 213 Mich App 239, 243 (1995). LEM must be struck from Mr. Montez's sentence.

Right to Jury Trial

In *Alleyene v United States*, 51 US 99 (2013), the United States Supreme Court held that the Sixth and Fourteenth Amendments require fact-finding by a jury for facts that increase mandatory sentences or "aggravate" the punishment. See also *People v Lockridge*, 498 Mich 398 (2015). LEM is an "additional punishment" that is mandatory for persons who commit CSC-I after August 28, 2006. *Cole*, 491 Mich at 336. The imposition of LEM aggravates a person's sentence because he would otherwise be permitted to live life without GPS monitoring upon the completion of his sentence. Because a jury did not find that the offense occurred after August 28, 2006, it violates Mr. Montez's right to a jury trial and to due process to increase his sentence by imposing LEM. US Const, Ams VI and XIV; Const 1963, art 1, §§ 14, 17.

Due Process

Further, the imposition of LEM violates Mr. Montez's due process rights where the trial court provided no notice or opportunity to be heard before adding LEM to

[15] See note 12, *supra*.

Mr. Montez's sentence. The trial court did not advise Mr. Montez at any point—prior to trial, during trial, or at sentencing—that he would be subject to LEM. The trial court simply issued a judgment of sentence that included LEM. *Judgment of Sentence*, attached. The court did not give Mr. Montez an opportunity to object to LEM on the record. US Const, Ams IV and XIV; Const 1963, art 1, § 17; MCR 6.435(B); MCR 6.429(A). LEM must be struck from Mr. Montez's sentence.

Summary and Request for Relief

For the foregoing reasons, Mr. Montez respectfully requests that this Honorable Court reverse and remand for a new trial. Mr. Montez requests this Court order that, if the prosecution intends to offer Thomas Cottrell as an expert witness upon retrial, the trial court must hold a *Daubert* hearing to determine whether the proposed testimony is both relevant and reliable as is required under MRE 702.

If remand has not yet been granted and this Court feels expansion of the record is necessary, Mr. Montez requests this Court remand his case to the trial court pursuant to MCR 7.211(C)(1) to allow him to move for a new trial and hold a *Ginther* hearing. Mr. Montez further requests that this Court order the trial court to provide funding to procure Dr. David Thompson's presence and testimony during the ordered *Ginther* hearing. See *People v Ulp*, 504 Mich 964 (2019).

Mr. Montez further requests this Court remand with instructions to remove descriptions of and references to acquitted conduct from his PSIR and to strike LEM from his Judgment of Sentence.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

Maya Menlo (P82778)
Assistant Defender
3031 W. Grand Blvd., Suite 450
Detroit, MI 48202
(313) 256-9833

Dated: March 4, 2021

Original - Court; 1st copy - Corrections; 2nd copy - Corrections (for return);
3rd copy - State Police CJIC; 4th copy - Defendant; 5th copy - Prosecutor

. OF MICHIGAN 17TH JUDICIAL CIRCUIT KENT COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 19-03225-FC

Court address: Kent County Courthouse 180 Ottawa NW, Grand Rapids, MI 49503 — Court telephone number: 616-632-5480

MI - 410025J
Police Report No.

THE PEOPLE OF THE STATE OF MICHIGAN	v	Defendant name, address, and telephone no. STEVEN LEE MONTEZ		
		CTN/TCN 41 19 001594 99	SID 3614879J	DOB 10/19/1969
Prosecuting attorney's name / Bar no. Christopher R. Becker P53752		Defendant's attorney name / Bar no. PUBLIC DEFENDER LAURA JOYCE		

1. The defendant was found guilty on 12/06/2019 of the crime(s) stated below.
Date

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC Code
1			NG		CSC-1ST DEG (PERSON U/13, DEF 17/YRS OR OLDER)	750.520B2B
2			G		CSC-1ST DEG (PERSON U/13, DEF 17/YRS OR OLDER)	750.520B2B
3				NP	CRIMINAL SEXUAL CONDUCT - SECOND OFFENSE NOTICE	750.520F
				NP	HABITUAL OFFENDER - FOURTH OFFENSE NOTICE	769.12

*For Plea: Insert "G" for guilty plea; "NC" for nolo contendere; or "MI" for guilty but mentally ill. *For dismissal: Insert "D" for dismissed by court or "NP" for dismissed by prosecutor/plaintiff

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.625(21)(b). M532777497807
☐ 3. HIV testing and sex offender registration is completed. Defendant's driver's license number
☒ 4. The defendant has been fingerprinted according to MCL 28.243.
☒ 5. A DNA sample is already on file with the Michigan State Police from a previous case. No assessment is required.
IT IS ORDERED:
☐ 6. Probation is revoked
7. Participating in a special alternative incarceration unit is ☐ prohibited. ☐ permitted.
8. Defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
2	02/11/2020	15			50		2-11-2020		324	CONCURRENT W/ANY OTHER PRISON SENTENCE NOW SERVING
							[illegible]			
							FEB [illegible]			

☐ 9. Sentence(s) to be served consecutively to (if this item is not checked, the sentence is concurrent.)
☐ each other. ☐ case numbers _____
JUDGE SULLIVAN
17TH JUDICIAL CIRCUIT
10. Defendant shall pay:

State Minimum	Crime Victim	Restitution	DNA Assess.	Court Costs	Attorney Fees	Fine	Other Costs	Total
$68.00	$130.00	$	$	$	$.00	$	$	$

The due date for payment is Date of Sentence. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.
☒ 11. The defendant is subject to lifetime monitoring pursuant to MCL 750.520n.
☐ 12. Court recommendation:

2-11-2020
Date

Judge HONORABLE PAUL SULLIVAN Bar no. P24139

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy Court Clerk

MCL 765.16(2); MCL 769.1k; MCL 769.16a; MCL 775.22, MCL 780.766
CC 219b (3/16) JUDGMENT OF SENTENCE, COMMITMENT TO DEPARTMENT OF CORRECTIONS MCR 6.427

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

STEVEN LEE MONTEZ,

Defendant.

Case No. 19-03225-FC

Hon. Paul J. Sullivan

OPINION & ORDER DENYING DEFENDANT'S MOTION TO CORRECT INVALID SENTENCE

Appearances:

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Kimberly Manns (P67127)
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Kent County Prosecutor's Office
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Grand Rapids, MI 49503

OPINION & ORDER DENYING DEFENDANT'S MOTION TO CORRECT INVALID SENTENCE

Defendant Steven Montez moves to correct an allegedly invalid sentence. In this motion, defendant argues his sentence is improperly based on consideration of a statement made at sentencing from someone who is not a "victim" in this case. For the reasons explained below, defendant's motion is respectfully DENIED.

I. TIMING OF THE HEARING

Before addressing the substance of this motion, there is a threshold issue of timing. This is a postjudgment motion filed with this Court under MCR 7.208(B) after a claim of appeal was filed with the Court of Appeals. That rule requires that the motion be *heard and decided* within 28 days of filing, "unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment." *See* MCR 7.208(B)(3).

This motion was originally filed on August 20, 2020, and noticed for a hearing on October 30, 2020, which is past the 28-day deadline. On October 12, 2020, defendant's appellate counsel filed a "motion to adjourn for good cause" explaining the hearing was set beyond the deadline due

to the demands of her caseload and the additional time was necessary for effective representation of her client.[1]

The Court is satisfied that there is good cause for the scheduling of the hearing beyond the ordinary deadline of MCR 7.208(B)(3), so the substance of the motion will now be addressed.

II. FACTS AND BACKGROUND

On December 6, 2019, a jury found defendant guilty of one count of first-degree criminal sexual conduct involving a victim under 13 and an offender 17 or older. The trial included testimony allowed under MCL 768.27a regarding defendant's other acts of child sexual abuse. Defendant was sentenced on February 11, 2020, to a minimum of 15 and a maximum of 50 years of incarceration, with that minimum being at the very top of the guidelines range.

Just prior to the sentencing hearing, there was discussion of the possibility of hearing statements from two trial witnesses who had testified as victims of the other acts of abuse. At the sentencing hearing, the Court acknowledged they were not "victims" in this case, but allowed one of them—Jessica Parsons—to give a brief statement. In Ms. Parsons's brief statement (which encompasses a total of about one page in the transcript), she discussed the impact on her life defendant's abuse had caused. The victim in this underlying case did not give a statement.

Prior to handing down the sentence, the Court carefully considered the input it received in the sentencing process and all of the circumstances. It was noted that the uncertain timing of the offense resulted in a potential 25-year mandatory minimum not applying.[2] The Court also briefly referenced victims of other acts, stating:

> I'm dealing with this case today, but I can't close my eyes to the fact that a number of people have been victimized and have been victimized pretty significantly. These things have a tendency to stick with you. Some victims are better able to deal with the issues, some have a very hard time dealing with the issues. You've already heard what—what the—what Ms. Parsons just said as to how it affected her. But the bottom line is I think it's pretty clear that your acts have had a significant impact on—on people, several people, not just one.

The Court acknowledged the prosecution had understandable arguments for exceeding the 15-year top of the guidelines, and the Court even noted that before the sentencing hearing it was considering a 17 ½- or 20-year minimum. However, based on defense counsel's arguments and all of the circumstances, the Court ultimately decided to stay within the guidelines and go with the 15-year minimum.

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[1] Counsel also noted that MCR 7.208(B)(3) has been amended, and, effective January 1, 2021, the 28-day deadline is changing to 56 days.

[2] The 25-year mandatory minimum was effective August 28, 2006. *See* 2006 PA 169. The range of possible dates of defendant's criminal act included time before that effective date, so the mandatory minimum was not applied to defendant's conviction.

Defendant now moves for a new sentencing hearing due to the consideration of Ms. Parsons's statement in the sentencing process.

III. LAW AND ANALYSIS

"[A] sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics." *People v Albert*, 207 Mich App 73, 74 (1994). It is undisputed that Ms. Parsons is not a "victim" in this case as defined by the Crime Victim's Rights Act, and there was no *requirement* to allow her to give a statement under the court rules. *See* MCR 6.425. However, it is also undisputed that there was also no *explicit bar* to allowing her statement. Still, defendant argues in his brief that allowing victims of other offenses to give statements opens a "Pandora's Box, permitting a parade of 'victims' to attempt to influence the sentencing decision." According to defendant, this could (and in this case did) improperly shift the focus away from defendant and the underlying offense.

Respectfully, while it is perhaps possible that the Court's discretion could be abused by allowing a "parade of 'victims'" to give statements and shift the focus away from the underlying offense, that is not at all what happened here. Rather, the Court allowed one out of two other-acts victims to give a brief statement. The Court then acknowledged her statement when explaining the sentence, but emphasized that the focus was on this offense. There was no error here.

Furthermore, it should be remembered that the Court *was originally inclined to exceed the guidelines* going into the hearing. The Court then carefully considered the arguments of defense counsel and other circumstances before opting instead to sentence defendant at the top of the guidelines. Thus, even if it were an error to allow the statement, it would still not require resentencing because there is no indication it impacted defendant's sentence. This was and is a valid sentence.

Order

For those reasons, defendant's motion to correct an invalid sentence is respectfully DENIED.

Dated: October 30, 2020

Paul J. Sullivan, Circuit Judge (P24139)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LEE MONTEZ,

Defendant-Appellant.

UNPUBLISHED
March 10, 2022

No. 353119
Kent Circuit Court
LC No. 19-003225-FC

Before: RIORDAN, P.J., and K. F. KELLY and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a); MCL 750.520b(2)(b). The trial court sentenced defendant to imprisonment of 15 to 50 years and also imposed lifetime electronic monitoring. Defendant appeals as of right. We affirm defendant's conviction, but we remand with instructions to amend the judgment of sentence to remove the lifetime-electronic-monitoring requirement.

I. BACKGROUND

Defendant's conviction relates to his sexual abuse of NE. He was specifically convicted of CSC-I on the basis that he engaged in penile-oral penetration with NE. Defendant was also charged with an additional count of CSC-I, relating to NE's sister, AE. As charged, defendant was alleged to have engaged in penile-vaginal penetration with AE. The jury, however, found defendant not guilty of the count related to AE.

NE and AE are the children of defendant's former girlfriend. According to NE and AE's mother, she and her children lived with defendant in Grand Rapids between 2004 and May 2008. Her relationship with defendant ended in 2008, and she and her children moved out of his house at that time. According to the testimonies of NE and AE, defendant sexually abused them while they lived in his home. NE testified about being abused on numerous occasions and, in particular, being forced to perform oral sex on defendant in exchange for candy. NE did not, however, recall specifically when the abuse occurred. AE described one instance of sexual assault. AE testified that she had repressed this memory for years before remembering it during a sexual encounter with her boyfriend.

In addition to the events relating to AE and NE, at trial, the prosecutor also introduced other-acts evidence asserting that defendant committed acts of criminal sexual conduct against three of his nieces: JP, EM, and MD. The events involving defendant's nieces were reported to have occurred between approximately 1997 and 2007. Defendant's nieces reported the sexual abuse by defendant in 2008, prompting a police investigation at that time. MD also told NE and AE's mother about defendant's conduct, which prompted her to end her relationship with defendant and move out of his house.

Shortly after allegations were made by defendant's nieces, AE and NE were asked about defendant and whether he had done anything inappropriate to them. Neither disclosed any abuse at that time; NE and AE were not made aware of the allegations of defendant's sexual abuse of his nieces. Years later, when NE was a freshman in high school, NE told a friend and NE's mother about the abuse, but the matter was not reported to authorities at that time. Later, in September 2018, AE reported the abuse to Children's Protective Services, prompting an investigation that eventually led to the charges and trial in this case.

A few instances that occurred during trial other than the general allegations of defendant's conduct bear mentioning at this point. At one point during trial, AE became emotional while testifying about the time defendant allegedly sexually assaulted her. AE started to cry and asked for her unspecified medication. The trial judge excused the jury from the courtroom so AE could compose herself. The trial judge did not address the incident with the jury when AE's testimony resumed or at any point thereafter.

Additionally, the prosecutor called an expert witness, Thomas Cottrell, who testified about "child sexual abuse disclosure and treatment." According to Cottrell, "half" or "more than half" of child-sexual-assault disclosures are delayed. He asserted that the percentage varies, depending "on the study one looks at," and that "sometimes it's upwards of 69 percent." Cottrell also testified that trauma produces "disjointed memories" that are less linear than typical memories, including negative memories. In comparison, memories of incidents that occurred many times can blend together without many distinguishing characteristics to differentiate distinct events. Finally, Cottrell also testified that children can create false memories, but he maintained that these memories were usually the result of "coaching," they would "fade" more quickly than real memories, and they rarely produced a strong emotional response because they never really happened.

During closing arguments, the prosecutor repeatedly referred to Cottrell's testimony. For example, the prosecutor stated:

> You also have the testimony of Tom Cottrell. Tom Cottrell corroborated a lot of what [AE] and [NE], and also the other victims, told you, you know, really in terms of how and when children disclose acts of child sexual abuse. It's very common for them to keep the secret, to delay disclosure. He talked about the difference and—and some of this may be a lot of common sense, but others—like he talked about common misperceptions because if you don't have a lot of training in this area or work in this area or know people who have been sexually abused, some things might seem unusual, such as, you know, disclosing.

The prosecutor also discussed at length how the testimony of NE, AE, and defendant's nieces compared to Cottrell's expert testimony on child sexual abuse and misconceptions regarding sexual abuse, including specifically topics like (1) delayed disclosure, (2) self-harming behavior in victims of sexual abuse, (3) how memories are stored, (4) traumatic memories and trigger events, (5) the level of detail in reports of sexual abuse, (6) false memories and coaching, and (7) grooming of sexual abuse victims. The prosecutor additionally characterized defendant's conduct at issue in this case as "evil," compared it to murder, and stated that it "doesn't get much worse" than what defendant did in sexually abusing children who trusted him. Defense counsel did not object to those comments.

During defense counsel's closing argument, she argued that AE and NE were not credible witnesses because they did not disclose the alleged sexual abuse earlier and the events happened so long ago that their memories were not reliable. Defense counsel also addressed AE's emotional reaction addressed earlier. She admitted that AE's testimony was "very emotional" and contrasted it with information about AE's initial disclosure to Children's Protective Services in which AE was "calm, normal." Defense counsel argued that this discrepancy established that AE was not a credible witness.

During rebuttal, the prosecutor argued that the jury should believe the testimony of AE and NE:

> And I submit to you in this case that there has been no evidence of any motive to lie because [defense counsel] said to you in her closing maybe it didn't happen at all. Okay, consider that, talk about that in your deliberations. Maybe it didn't happen at all, then why in the heck are they saying it happened? There's been no evidence they have any motive to lie here. They didn't willingly run to the police to try and get the defendant in trouble. All of this came about because AE was specifically asked about it. And throughout this entire week, there has been no evidence showing why they would have any motive to lie about it.
>
> They have nothing to gain from reporting these sexual assaults. Defendant has not been in their lives for a while. They don't get money from this. But what happens instead? I mean, they have to go through this again. They have to relive it. They open themselves up to harsh questioning by everybody, by myself, by the defense attorney, by police, by therapists, by their families. So I ask you that, when considering whether they have any motive to lie, why would they make it up, unless it happened? There's no evidence to the contrary that they would have any motive to lie in this case.
>
> What do they have to gain by doing this? Nothing. And what do they have to lose? Being revictimized again.

At this point, defense counsel interjected with an objection that the prosecutor's revictimization argument was improper. The trial court overruled the objection. The prosecutor then continued:

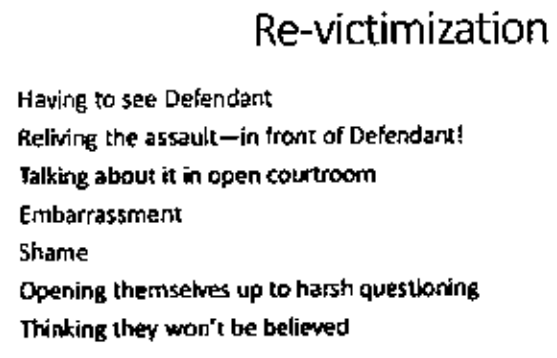
> How is it revictimization? I'm sure you can imagine. I mean, having to come in here and having to see the defendant, having to relive it in front of him,

having to relive it in front of all you talking about these sexual activities that they clearly never wanted to talk about. They may have kept the secret forever or for a lot longer except for how things played out in this case with [Children's Protective Services] getting involved, the police being told. How is it not revictimization to come in and have to do all this again, reliving the embarrassment and the shame and the emotions and opening themselves up to questioning and thinking they won't be believed.

Defense counsel again objected. Although defense counsel did not request a curative instruction, or propose any particular language for an instruction, the trial court contemporaneously instructed the jury as follows:

> You have to judge credibility using the typical tools you use to judge that. Ladies and gentlemen, the term "victim," I guess I'll just—we use that term because it's a term that we use when people are charged with a crime you have a defendant, you have a victim. I think we—I might be getting this confused with another recent case, but I think we talked about that a little bit. The term "victim" may be totally appropriate depending on what you determine at the end of the trial. But it's just—it's basically a way of identifying the participants in this trial right now and should not give you any particular suggestion that someone is a victim because they're being designated as a victim. Whether they're a victim or not depends on your findings at the end of the trial.
>
> So in the course of final arguments, closing arguments like this, we give both attorneys some latitude in their suggestions to you about how you should view the evidence. But in the end, as I told you earlier, if either attorney says something that you believe is not supported by the evidence as fairly determined by you, you go by your recollection. I'll leave it at that.

Following the trial court's instruction, the prosecutor finished her rebuttal argument without any additional mention of revictimization. The prosecutor did, however, utilize a PowerPoint presentation during her closing argument. One of the slides in that presentation focused on revictimization:



Trial counsel specifically objected to that slide as well.

After closing arguments concluded, the trial judge instructed the jurors. In relevant part, the trial judge instructed the jurors that they "must not let sympathy or prejudice influence [their] decision." The trial judge additionally instructed the jurors to consider Cottrell's expert opinion, but stressed that they were not required to accept Cottrell's opinion as fact. The trial judge gave standard jury instructions about the jurors' roles as the fact-finders in this case and that statements by the trial judge and the attorneys were not evidence. After deliberating for a few hours, the jurors returned a verdict finding defendant not guilty of Count I (CSC-I for sexually abusing AE), but guilty of Count II (CSC-I for sexually abusing NE).

In preparation for defendant's sentencing, the Department of Corrections prepared a presentence investigation report. The report noted that defendant was acquitted of Count I and found guilty of Count II. The description of defendant's offense addressed the allegations of AE and NE as well as the process that led to their disclosures to law enforcement. That portion of the report, however, did not specify that defendant was acquitted of the charge arising from AE's allegations. The report also asserted that defendant was subject to lifetime electronic monitoring under MCL 750.520n. The trial court and the attorneys did not address lifetime electronic monitoring at sentencing, but the judgment of sentence ordered it as part of defendant's sentence.

Defendant then filed an appeal with this Court. About two months after filing his brief on appeal, however, defendant filed a motion to remand with this Court, asking for a *Ginther*[1] hearing to further develop the record in support his claim that his trial counsel was ineffective. Defendant attached two affidavits to his motion. We note that, although not part of the lower court record, because defendant filed a timely motion to remand for a *Ginther* hearing, we consider the affidavits he provided on appeal for purposes of determining whether a remand for further factual development is warranted. See *People v Moore*, 493 Mich 933 (2013). The first affidavit was from defendant's appellate counsel. This affidavit asserted that trial counsel "asked around" about an expert witness to call at trial, but that trial counsel "Was not able to get the name of an expert." Accordingly, trial counsel "did not consult an expert" in this case. The second affidavit was from Dr. David Thompson, Ph.D., a clinical and forensic psychologist.

According to Dr. Thompson, half of child-sexual-assault disclosures are delayed. Dr. Thompson additionally averred that "traumatic memories are generally more fully and completely recollected than non-traumatic memories." He also addressed the creation of false memories. According to Dr. Thompson, there is ample research that children can form false memories "without deliberate coaching by an adult." He averred that "source misattribution errors occur on their own without any prompting" as a result of overhearing conversations, improper questioning about abuse, and unspecified "psychotherapeutic techniques that are used to treat children that have experienced trauma."

Dr. Thompson additionally averred that he was not aware of any "credible evidence that false memories fade more quickly than other memories." Finally, Dr. Thompson also addressed "co-witness conformity," a subject not mentioned at all during trial. According to Dr. Thompson, cowitness conformity "is the process by which individuals who witnessed an event may be

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

influenced by co-witnesses. When two individuals talk about their individual experiences of a similar event, the conversation may result in changes to one or both individuals' memories." Dr. Thompson's affidavit specifically addressed a cowitness-conformity study demonstrating its effect on young children and preteens.

This Court denied defendant's motion to remand "without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar." *People v Montez*, unpublished order of the Court of Appeals, entered May 17, 2021 (Docket No. 353119). Defendant then filed a renewed motion to remand shortly before oral argument in this case.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE

Defendant first argues that his trial attorney provided ineffective assistance by failing to consult and call an expert on child sexual abuse and false memories. Defendant requests a new trial or, alternatively, a remand for a *Ginther* hearing. Because there has not been a *Ginther* hearing in this case "our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

"To establish ineffective assistance of counsel, defendant must show (1) that defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's errors, a different outcome would have resulted." *People v Jackson*, 292 Mich App 583, 600-601; 808 NW2d 541 (2011). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

In this case, although defendant's offer of proof may have potentially warranted factual development on the adequacy of counsel's performance, see MCR 7.211(C)(1)(a), we conclude that defendant is not entitled to a new trial, and that a remand for a *Ginther* hearing is unnecessary, because it is clear that defendant cannot establish prejudice from counsel's failure to consult or call an independent expert in child sexual abuse and false memories. See *Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In particular, with regard to establishing prejudice, a defendant must show that, "but for counsel's deficient performance, there is a reasonable probability that the outcome of the defendant's trial would have been different." *People v Ackley*, 497 Mich 381, 394; 870 NW2d 858 (2015) (cleaned up). Under this standard, a defendant does not have to show that the evidence would have ensured acquittal, *id.* at 397, nor must a defendant show that counsel's "failure more likely than not altered the outcome," *Harrington v Richter*, 562 US 86, 111-112; 131 S Ct 770;

178 L Ed 2d 624 (2011) (quotation marks and citation omitted). Nevertheless, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. When "there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." *People v Trakhtenberg*, 493 Mich 38, 56; 826 NW2d 136 (2012) (quotation marks and citation omitted).

On the issue of prejudice, defendant relies on the affidavit of Dr. Thompson to establish that, but for trial counsel's failure to consult an expert and offer independent expert testimony, there was a reasonable probability of a different outcome. In this regard, defendant maintains that Dr. Thompson could have (1) rebutted expert testimony from Cottrell by identifying contradictory research, and (2) offered additional testimony on false memories, including specifically information on source-misattribution error and cowitness conformity. Contrary to defendant's arguments, his ineffective-assistance claim fails because the proposed testimony from Dr. Thompson does not establish a reasonable probability of a different outcome.

First, defendant maintains that Cottrell inaccurately testified that upwards of 69% of child-sexual-abuse victims delay their disclosure when, according to Dr. Thompson, only half of disclosures are delayed and approximately half of all disclosures occur "close in time" to the alleged abuse. In actuality, Cottrell testified that "half" or "more than half" of abuse disclosures are delayed. He asserted that the percentage varies, depending "on the study one looks at," and that "sometimes it's upwards of 69 percent." In other words, Cottrell acknowledged there were different studies on the topic of delayed disclosure, and he even testified that "half" of the disclosures are delayed. His testimony is not materially inconsistent with Dr. Thompson's view on the topic. Furthermore, in his affidavit, Dr. Thompson specifically relied on a study published in 2020, which was *after* the trial in the current case, making it hard to see how this testimony could have been presented or how Cottrell could be challenged for not knowing of a study that did not exist when he testified. Additionally, and perhaps most importantly, the basic point of Cottrell's testimony is that, contrary to popular perception, not all children immediately report abuse and in fact many children delay reporting. This is true whether the percentage of delayed reports is 50% or 69%. Dr. Thompson's testimony on this topic would not alter the outcome of trial.

Second, Cottrell testified that trauma produces "disjointed memories" that are less linear than typical memories, including negative memories. According to Dr. Thompson, this is inaccurate, and in fact, the opposite is true. That is, according to Dr. Thompson, "traumatic memories are generally more fully and completely recollected than non-traumatic memories." Although Dr. Thompson's testimony on this point would clearly contradict Cottrell's testimony on the "disjointed" nature of traumatic memories, a contradiction on this point is not reasonably likely to alter the outcome. Fairly considered, Cottrell's testimony on traumatic memories—which focused extensively on "triggers" that are likely to bring back the traumatic memories—was offered to explain *AE*'s purported incomplete memory of events, why she may have previously blocked out the abuse, and her sudden recall of the abuse during an encounter with her boyfriend. Indeed, the prosecutor used Cottrell's testimony on trauma during closing argument to argue that *AE* "did store [the memory] as a traumatic memory." Because AE purportedly experienced terror during a one-time incident of sexual assault, the prosecutor asserted that she stored the memory as a traumatic memory, she essentially blocked the memory, and she later recalled the incident when

presented with a "trigger" while with her boyfriend. In this context, Dr. Thompson's proposed testimony on traumatic memory would clearly have been relevant to AE's disjointed memories of abuse. But the jury found defendant not guilty of the charge related to AE.

In comparison, Cottrell's traumatic-memory testimony had little or no relation to NE. NE did not describe triggers, blocked memories, sudden recall, or anything indicative of the traumatic-type memory that Cottrell described. And the prosecutor did not argue that NE's memories were affected by trauma. To the contrary, the prosecutor contrasted AE's one-time traumatic memory with a situation—more akin to NE's—in which "something is more frequent, happening regularly, often, on a daily or weekly basis," such that it may become "more normal, wrong, of course, but more normal, as part of life." Indeed, although acknowledging that NE's memories of abuse were not complete in terms of detail or every single act that happened, the prosecutor did *not* attribute this to trauma, but instead asserted that NE could not remember every detail because it happened on a regular basis and the events blended together. Cottrell offered testimony on how memories of repeated events can become blurred, particularly for children who do not "use the same markers" as adults in terms of time and place to organize their thoughts. He noted that it is not uncommon for children to "confuse multiple occurrences as a similar sort of event." But this testimony on multiple occurrences blurring in a child's mind had nothing to do with Cottrell's testimony on trauma, and Dr. Thompson's proposed testimony on traumatic memory would be irrelevant to the charge related to NE. In short, Cottrell's testimony on trauma did not relate to NE, and to the extent Dr. Thompson could have challenged Cottrell's testimony as related to AE's traumatic memories, it is immaterial at this juncture because the jury found defendant not guilty of the conduct related to AE. Consequently, the dispute about the formation of traumatic memories does not establish a reasonable probability of a different outcome.

Third, defendant maintains that Dr. Thompson could have contradicted Cottrell's testimony on the formation of false memories. In this regard, during cross-examination, Cottrell testified that the creation of false memories is possible particularly in young children, but he also testified that it required a "deliberate process," such as "coaching," and that it was not something that would "occur on its own." In contrast, in his affidavit, Dr. Thompson stated that there is ample research that children can form false memories "without deliberate coaching by an adult." He averred that "source misattribution errors occur on their own without any prompting" as a result of things like "overhearing other people's conversations" or "as a result of participating in therapeutic treatment." He also stated that he is "aware of no credible evidence that false memories fade more quickly than other memories."

Although Dr. Thompson could have contradicted Cottrell's assertion that false memories require a deliberate process, such as coaching, failure to present such testimony—and to provide additional testimony on source misattribution—did not affect the outcome of trial. To be admissible, under MRE 702, expert testimony needs to be both relevant and reliable. *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012) (opinion by KELLY, J.). "[E]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* at 121 (quotation marks and citation omitted). See also *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008). For example, in the context of child-sexual abuse, expert testimony may be offered for the purpose of explaining a specific behavior that the jury might otherwise construe as inconsistent with abuse or to rebut attacks on credibility. *People v Peterson*, 450 Mich 349, 372; 537 NW2d 857 (1995). But this is dependent on the underlying facts of the particular case in

question. See *id.* That is, "*if the facts of a particular case* show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony about that particular characteristic . . . would be admissible to dispel any myths the jury may hold concerning that behavior." *Id.* (quotation marks and citation omitted; emphasis added).

As applied in this case, Dr. Thompson's proposed testimony—that false memories can be created in the absence of deliberate coaching by, for example, overhearing a conversation, repeated questioning, or participating in therapy—is not particularly relevant because there is no underlying factual foundation to support that NE (or AE) may have formed false memories through source misattribution as described by Dr. Thompson. For example, there is no evidence that (1) NE or AE overheard any conversation about defendant or his conduct with his nieces, (2) they were subjected to "repeated questioning" involving improper techniques or a biased interviewer, or (3) they engaged in repeated conversations about events that did not occur. In fact, AE and NE both expressly denied knowing any of the specific allegations of the abuse that defendant perpetrated on his nieces. And the overwhelming and undisputed testimony—from their mother and defendant's nieces—was that the nature of the allegations by defendant's nieces against defendant were *never* discussed with NE or AE. At most, NE and AE were asked—without any discussion of details—as children whether anything inappropriate happened with defendant, and they said no. Nothing in Dr. Thompson's description of source misattribution supports that this sort of brief and isolated questioning would or could result in the formation of false memories. Similarly, nothing in the record suggests that NE's therapy would or could have caused false memories. On this record, Dr. Thompson's testimony on source misattribution is, at most, minimally relevant, and it appears highly improbable that such testimony would have affected the outcome of the proceedings.

In the context of false memories, Dr. Thompson also asserted, in comparison to Cottrell's testimony that false memories fade more quickly than other memories, that he was not aware of any credible evidence that false memories fade more quickly than other memories. Dr. Thompson does not, however, state one way or the other whether false memories fade more quickly, last longer, or otherwise differ from true memories in terms of how long they last. Unlike with his other opinions, Dr. Thompson cites no articles or other sources related to how long false memories last in comparison to other memories. It appears that he is simply unaware of any research on this topic. Dr. Thompson's assertion that he lacks awareness of a specific topic is not particularly helpful, and it does not create a reasonable probability of a different outcome.

Fourth and finally, defendant contends that Dr. Thompson could have offered testimony on "co-witness conformity," a subject not mentioned at all during trial. Considering Dr. Thompson's affidavit and the evidence in this case, Dr. Thompson's potential testimony on cowitness conformity is not particularly relevant on the facts of this case, and such testimony would not create a reasonable probability of a different outcome. The testimony at trial was that NE and AE did not discuss their abuse by defendant until AE was 17 years old, at which time NE was already an adult. Although Dr. Thompson vaguely asserted in his affidavit that cowitness conformity has been "well studied" in children *and* adults, the only detailed information he provided related to children under the age of 12, and he failed to explain how—or to what degree—it may apply to individuals over the age of 12. Moreover, Dr. Thompson discussed cowitness conformity in the context of altering details of memories when children were shown "slightly

different" video clips of *the same event*. NE and AE never claimed to have participated in the same event. They testified that they were separately abused by defendant. Dr. Thompson failed to explain how, if at all, cowitness conformity applies to individuals discussing different events.

Lastly, it should be noted that NE and AE both disclosed their allegations of defendant's abuse to other people before discussing them with each other. Even if cowitness conformity could have conceivably altered the details of their memories, this charge of recent fabrication—albeit unconscious fabrication—is rebutted by their prior identifications of defendant. See MRE 801(d)(1)(B). Overall, Dr. Thompson's potential testimony on the topic of cowitness conformity has little relevance to the facts of this case, and it does not appear reasonably probable that this marginally probative evidence would have affected the outcome of trial.

In sum, defendant has not established that he was denied the effective assistance of counsel or that a remand for a *Ginther* hearing is warranted on the facts of this case.

B. PROSECUTORIAL MISCONDUCT

Defendant also maintains on appeal that the prosecutor denied him a fair trial by engaging in three impermissible arguments. First, defendant contends that the prosecutor advanced an improper vouching argument by asserting that Cottrell's testimony "corroborated" the testimony from NE and AE. Second, defendant argues that the prosecutor appealed to the jury's sympathies and sense of civic duty by advancing a "revictimization" argument. Third, defendant asserts that the prosecutor denied him a fair trial by comparing CSC to murder and asserting that defendant's acts were "evil."

"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). Defendant preserved his argument related to the prosecutor's corroboration statement by objecting and requesting a curative instruction. See *id.* To the extent that he sought a mistrial on the basis of the prosecutor's revictimization argument, his request for a mistrial is preserved. See *People v Haynes*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 350125) (2021); slip op at 7. But to the extent defendant now contends that alternative relief, such as a curative instruction, was warranted based on the prosecutor's revictimization argument, his argument is unpreserved because he failed to make such a request in the trial court. See *Bennett*, 290 Mich App at 475. Likewise, to the extent defendant challenges the prosecution's assertions that defendant's conduct was "evil" or worse than murder, defendant failed to object and request a curative instruction in the trial court, meaning that his argument in this regard is unpreserved. See *id.*

Preserved claims of prosecutorial misconduct are reviewed de novo by this Court to determine whether the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id.* Unpreserved issues are reviewed for plain error. *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (cleaned up).]

"A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.' " *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (citation omitted).

"When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 513 (2003). A prosecutor's comments must be read as a whole, and the propriety of the prosecutor's remarks depend on the particular facts of the case, the defendant's arguments, and the evidence admitted at trial. *Id.* "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236 (citations omitted).

1. VOUCHING

Defendant first contends that the prosecutor impermissibly used Cottrell's testimony to bolster the credibility of NE and AE. When discussing witness credibility, a prosecutor may not vouch for a witness by implying that the prosecutor has some special knowledge of a witness's credibility. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecutor, however, is free to comment on witness credibility and "to argue from the evidence and its reasonable inferences in support of a witness's credibility." *Bennett*, 290 Mich App at 478.

In this case, the prosecutor said nothing to suggest any personal knowledge of credibility. Instead, in the portion of the prosecutor's argument challenged by defendant, the prosecutor asserted that Cottrell's testimony "corroborated" the testimony given by NE, AE, and defendant's nieces. Defendant focuses on the prosecutor's statement that "Cottrell corroborated a lot of what [AE] and [NE], and also the other victims, told you, you know, really in terms of how and when children disclose acts of child sexual abuse." When reviewed as a whole, the prosecutor's closing argument addressed at length how the testimony of NE, AE, and defendant's nieces compared to Cottrell's expert testimony on child sexual abuse and misconceptions regarding sexual abuse, including topics like delayed disclosure and explanations regarding memories of traumatic events as well as repeated events. The prosecutor also addressed the level of detail in reports of sexual abuse, false memories and coaching, and grooming of sexual abuse victims. Cottrell offered testimony on the various topics discussed, meaning that there was an evidentiary basis for the prosecutor's argument that the victims' behaviors and any gaps in their memories were consistent

with Cottrell's testimony on the behaviors and memories of victims of child sexual abuse. See *Unger*, 278 Mich App at 236.

Nevertheless, defendant maintains that the prosecutor's argument was improper because it would be impermissible for Cottrell to vouch for the victims' credibility, and it should, therefore, be impermissible to use Cottrell's testimony to bolster the victims' credibility. In making this argument, defendant relies on *People v Thorpe*, 504 Mich 230, 259; 934 NW2d 693 (2019), for the proposition that an expert in child sexual abuse cannot vouch for a victim's credibility by, for example, testifying about the percentage of children who lie about sexual abuse. See also *People v McFarlane*, 325 Mich App 507, 521-522; 926 NW2d 339 (2018). To be clear, in relying on *Thorpe*, defendant does not contend that *Cottrell* impermissibly vouched for the victims or otherwise offered improper testimony on credibility or defendant's guilt. Instead, defendant maintains that *the prosecutor* misused Cottrell's otherwise proper testimony during closing. Defendant's argument lacks merit.

It is well recognized that, as occurred in this case, "the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse." *Peterson*, 450 Mich at 373. Moreover, "[t]he prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." *Id.* This is precisely what occurred in this case. When the prosecutor's argument about Cottrell is read as a whole and in context, the prosecutor permissibly compared Cottrell's testimony to the facts of this case to explain the delayed disclosure of abuse, matters related to memory and "triggering" events, and other issues relevant to the behaviors of NE, AE, and defendant's nieces. This was proper under *Peterson*.

Rather than consider the prosecutor's argument as a whole, defendant reads the word "corroborated" in isolation and asserts that the use of the word "corroborate" was an attempt to use Cottrell's testimony for improper vouching purposes. But even if use of the term "corroborated" was inartful, this isolated comment in an otherwise proper argument about Cottrell's testimony does not warrant reversal of defendant's conviction. See *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). Moreover, although the trial court denied defendant's request for a specific curative instruction, the trial court properly instructed the jurors that they alone must decide the facts of the case and witness credibility, they must decide the case on the evidence properly admitted, the lawyers' statements and arguments were not evidence, and the jurors did not have to believe an expert's opinions. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). On the whole, there has been no assertion that Cottrell's testimony actually constituted impermissible vouching testimony under *Thorpe*; the prosecutor properly compared the behavior of NE and AE to Cottrell's testimony as allowed under *Peterson*; and a properly instructed jury considered the evidence against defendant. Defendant was not denied a fair and impartial trial. See *Mann*, 288 Mich App at 119.

2. REVICTIMIZATION

Defendant also argues that the prosecutor improperly appealed to the jurors' sympathies and sense of civic duty by arguing that AE and NE faced "revictimization" as a result of having to

appear at trial. According to defendant, the trial court abused its discretion by denying his motion for a mistrial or, at a minimum, the trial court should have sua sponte taken some action to address the issue. The prosecutor's revictimization argument was made during rebuttal, in the context of the prosecutor's more general assertion that NE and AE had no reason to lie. As described earlier, the prosecutor repeatedly stated that AE and NE were being revictimized by testifying at trial and that revictimization weighed against any suggestion that they were not testifying truthfully. The prosecutor also had a PowerPoint slide on the subject. Trial counsel objected, and the trial judge gave a contemporaneous instruction to the jury about the use of the word "victim" during the trial.

Considering the prosecutor's arguments as a whole and in context, we initially note that the prosecutor generally couched her revictimization argument in the context of a credibility discussion and an assertion that NE and AE had nothing to gain and no reason to lie by making allegations against defendant. Prosecutors are "generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. And a prosecutor may comment on witness credibility and argue, based on the evidence, that a witness had no motive to lie. *Thomas*, 260 Mich App at 455-456.

That said, a prosecutor should not "invite[] jurors to suspend their powers of judgment and decide the case on the basis of sympathy or civic duty." *Lane*, 308 Mich App at 66. In this case in particular, the prosecutor exceeded the bounds of proper argument by arguing that NE and AE faced revictimization as a result of the trial and by asserting that they would be revictimized if they were not believed. See *Unger*, 278 Mich App at 237. Such an argument constituted an improper appeal to the jurors' sympathies. See *id.* Indeed, as framed by the prosecutor in this case, NE and AE were "revictimized" by defendant's exercise of his constitutional right to a trial, including his right to confront the witnesses against him. That is, the prosecutor argued that NE and AE had been revictimized because they came to court, saw defendant, and answered questions before the jury. As argued by the prosecutor, the jury itself was part of the problem because NE and AE faced the risk that "they won't be believed" and that too would constitute revictimization. Certainly, appearing at trial to testify, particularly about a painful topic like sexual abuse, can be a difficult experience. But it is nevertheless true that a jury's determination of guilt must be based on the evidence, not sympathy. These kinds of revictimization arguments—asserting that victims should be believed because they have been revictimized by a trial or because failure to believe them would revictimize them—are improper attempts to arouse the jury's sympathies. See *id.*

Although the prosecutor's argument was improper, relief is not warranted on appeal. First, to the extent defendant sought a mistrial, and argues on appeal that a mistrial should have been granted, a mistrial was not warranted because revictimization arguments—while improper—can be addressed with a curative instruction. See *id.* Second, even though defendant did not request a curative instruction or propose any particular language for an instruction, the trial court sua sponte instructed the jury that the term "victim" may not be an appropriate description for the complainants in this case, making clear that NE and AE were not "victims" simply because they had made allegations and appeared in court. The trial court also specified that the jury decided issues of credibility and that the jury did not have to accept the prosecutor's arguments. Third, aside from this contemporaneous instruction on "victims" and issues of credibility, the trial court also provided standard jury instruction on assessing credibility, not letting sympathy influence the jury's verdict, and that the lawyers' arguments were not evidence. Jurors are presumed to follow their instructions, and these general instructions, particularly when coupled with the trial court's

more specific instruction on "victims," alleviated the prejudice to defendant. See *id.* Fourth, in concluding that the instructions were sufficient to cure any prejudice to defendant in this case, it again bears noting that the jury found defendant not guilty of the charge related to AE. Clearly, notwithstanding the prosecutor's improper revictimization argument, the jury understood its role in assessing credibility and had no qualms about disbelieving one of the alleged victims. On this record, the prosecutor's improper revictimization argument did not deny defendant a fair and an impartial trial. See *Mann*, 288 Mich App at 119. He is not entitled to relief on appeal.

3. NATURE OF THE OFFENSE

Defendant also argues that the prosecutor erred by (1) comparing child sexual abuse to murder, and (2) describing defendant's conduct as "evil" and noting that it "doesn't get much worse" than what defendant did in sexually abusing children who trusted him. Considered in context, the prosecutor's arguments in this regard were not improper. The prosecutor did not inject into trial issues that were broader than defendant's guilt or ask the jurors to suspend their judgment, but urged the jury to convict defendant because the evidence established that defendant was guilty of egregious acts. These arguments focused on the evidence were not improper. See *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Further, although the prosecutor used "hard language," this was not improper during closing. See *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Even assuming arguendo that there was error, defendant would not be entitled to relief on appeal because defendant failed to object and a timely objection and curative instruction could have alleviated any potential error. See *Unger*, 278 Mich App at 237.

C. COURTROOM DISTURBANCE

Next, defendant argues that he was denied a fair trial when AE became emotional during her testimony. Defendant describes the incident as an "emotional breakdown," and he asserts that AE's "loved ones rushed to the witness stand to comfort her." Defendant failed to object in the trial court or request a curative instruction or other relief. Nevertheless, on appeal, defendant argues that the trial court should have sua sponte polled the jurors regarding their impartiality and issued a curative instruction related to AE's outburst. Defendant failed to raise this issue in the trial court, so it is unpreserved and reviewed for plain error. See *Jackson*, 292 Mich App at 592.

Factually, defendant's argument relates to a recess taking during AE's direct-examination testimony. While being asked about the incident of sexual abuse allegedly perpetrated by defendant, AE began to cry and the trial court ordered a recess. Following a short recess, trial reconvened and AE continued her testimony. Defendant made no objection during these events, and defendant did not request a curative instruction, a mistrial, or any other relief. This is the entirety of the incident as reflected in the original record that forms the basis for our review. See MCR 7.210(A).

Defendant has not established plain error in the trial court's decision to call a recess when AE became emotional during her testimony. "It is well established that the trial court has a duty to control trial proceedings in the courtroom and has wide discretion and power in fulfilling that duty." *People v Biddles*, 316 Mich App 148, 153; 896 NW2d 461 (2016). The trial court's authority to insist that a case is tried in a proper and orderly manner includes discretion in responding to outbursts in the courtroom. See *People v Inman*, 315 Mich 456, 473-474; 24 NW2d

176 (1946). Emotional reactions by victims and others have been described as a "natural" response to reliving events during trial, 99 ALR 6th 113, and depending on the facts of a case, evidence of a victim's "emotional state" may actually be relevant to evaluating a victim's credibility or the weight to give testimony by others who have described the victim's emotional state following a crime, see *People v Shorter*, 324 Mich App 529, 541; 922 NW2d 628 (2018). At that same time, there is a risk that "such emotional reactions may be unfair to the defendant, as the jury may convict the defendant not on the basis of actual evidence but on the basis of mere sympathy with the victims." 99 ALR 6th 113.

As one example of an emotional outburst and the trial court's response thereto, in *People v Gonzales*, 193 Mich App 263, 264-265; 483 NW2d 458 (1992), the victim had an "outburst" during cross-examination by defense counsel and exclaimed: "I have never slept with the scum and what happened to me is not right, and I'm through cooperating with you; do you understand me? He's an ass hole, murderer, and I don't care if I blew this case." The defendant moved for a mistrial or, in the alternative, for a curative instruction. *Id.* at 265. The trial court denied the mistrial but read a curative instruction to the jury, and this Court found no error on appeal. *Id.* at 265-266. Another example of a courtroom disturbance may be found in *People v Bauder*, 269 Mich App 174, 194-195; 712 NW2d 506 (2005), overruled in part on other grounds as recognized in *People v Burns*, 494 Mich 104, 112-113; 832 NW2d 738 (2013). That case involved a "courtroom outburst by the victim's brother," who yelled that the defendant had "killed his sister." *Id.* The defendant moved for a mistrial, which the trial court denied. *Id.* at 194. The trial court, however, took other steps to preserve defendant's right to a fair and impartial trial, which included asking the jurors if they could disregard the outburst and remain impartial as well as instructing the jury that the outburst was not evidence. *Id.* at 194-195.

In this case, in response to AE's crying on the witness stand and her request for her medication, the trial court promptly called a recess and removed the jury from the courtroom. Unlike in *Gonzalez* and *Bauder*, defendant did not object or move for a mistrial or request any other action, such as a curative instruction or questioning the jury. Yet, on appeal, defendant now claims that the trial court should have sua sponte undertaken such action. But in the cases on which he relies—e.g., *Gonzalez* and *Bauder*—the defendants objected to the outbursts and requested relief. Defendant cites no authority for the proposition that the trial court was required to sua sponte poll the jury or issue a curative instruction when AE became emotional on the stand. See generally *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

Defendant also cites no authority for his assertion that the recess called by the trial court was categorically inadequate to address any potential prejudice. As noted, the trial court has wide discretion in controlling and maintaining order in the courtroom. See *Inman*, 315 Mich at 473-474; *Biddles*, 316 Mich App at 153. In this case, the trial court exercised that discretion by calling a recess and removing the jury from the courtroom when AE became emotional. The trial court was in the best position to assess AE's emotional demeanor and any potentially prejudicial effect on the jury. See generally *People v Albers*, 258 Mich App 578, 588; 672 NW2d 336 (2003); *People v Lee*, 212 Mich App 228, 251; 537 NW2d 233 (1995). By the same token, the trial court was in the best position to determine the appropriate response to AE's emotional testimony. In the absence of an objection by defendant or any other request for relief, defendant has not shown plain error in the trial court's decision to call a recess rather than sua sponte polling the jury and issuing a curative instruction.

In concluding that defendant has failed to show plain error, three additional points warrant mention. First, although the trial court did not issue a curative instruction during AE's testimony, the trial court did instruct the jurors that they "must not let sympathy or prejudice influence [their] decision." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279. Second, although defendant now contends that AE's outburst prejudiced him, at trial, defense counsel used AE's outburst to the defense's benefit during closing arguments, contrasting AE's "very emotional" testimony with her "calm, normal" demeanor when speaking with Children's Protective Services. Indeed, as defense counsel evidently recognized, depending on the facts, a witness's emotions may be relevant to assessing credibility, *Shorter*, 324 Mich App at 541, and outbursts may be just as likely to impugn credibility as to bolster it. Particularly in view of counsel's use of this incident to benefit the defense, and considering the record before this Court, defendant has not established that he was prejudiced by AE's outburst. See *People v Dixon-Bey*, 321 Mich App 490, 511; 909 NW2d 458 (2017). Third, the jury ultimately returned a verdict of not guilty with respect to the charge related to AE. That the jury returned a not-guilty verdict on this count is a very strong indication that the jury was not swayed in the prosecution's favor by AE's emotional outburst and that the incident did not affect the outcome of trial. For all these reasons, defendant has not shown plain error, and he is not entitled to relief on appeal.

Finally, we note that, on appeal, defendant attempts to expand the record by attaching an affidavit—from an intern with the public defender's office who attended defendant's trial—to his brief on appeal. This affidavit, however, was never presented in the lower court, and defendant may not now expand the record on appeal. See *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Indeed, defendant has made no effort to move for the expansion of the record on appeal or to seek an evidentiary hearing to develop a factual record on this issue. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Nevertheless, we have reviewed this affidavit, and even if this affidavit is considered, we would conclude that defendant is not entitled to relief on appeal.

D. CUMULATIVE ERROR

Defendant also argues that the claims of error we have already discussed—even if insufficient to merit relief individually—entitle defendant to a new trial if considered cumulatively. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). "In making this determination, only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 293 n 64; 531 NW2d 659 (1995). In this case, as we have discussed, defendant's only claim of error with merit relates to the prosecutor's revictimization argument, which improperly appealed to the jurors' sympathies. And, as already discussed, this error did not, on its own, warrant a new trial. Given that there is only one actual error and that error does not warrant reversal, defendant has not shown that the cumulative effect of multiple errors warrants relief on appeal. See *Dobek*, 274 Mich App at 106.

E. PRESENTENCE INVESTIGATION REPORT

Next, defendant challenges the information included in his presentence investigation report. Specifically, defendant asserts that information relating to AE's allegations—as recounted in the agent's description of events—should be stricken from the presentence investigation report because it relates to acquitted conduct and it is simply not relevant. Although defendant preserved this issue by raising it in his motion for remand filed with this Court, he did not raise this issue at sentencing. See MCR 6.429(C); *People v Lloyd*, 284 Mich App 703, 706 & n 1; 774 NW2d 347 (2009). Accordingly, we do not have a trial-court ruling to review. Thus, we must address this issue in the first instance akin to de novo review.

As noted by defendant, the agent's description of the offense in the presentence investigation report includes a summary of events related to AE as well as NE, specifically detailing AE's disclosures during the Children's-Protective-Services investigation, her allegations against defendant, and her disclosures to NE, which resulted in NE also coming forward to speak with authorities about defendant's abuse. The presentence investigation report also clearly states, however, that defendant was found not guilty of Count I—the charge related to AE.

Defendant is correct that "a sentencing court may not rely even in part on acquitted conduct when imposing a sentence for the defendant's conviction." *People v Stokes*, 333 Mich App 304, 310; 963 NW2d 643 (2020). It does not follow, however, that information about acquitted conduct cannot appear in a presentence investigation report. As explained by this Court:

> [A] sentencing court may review a [presentence investigation report] containing information on acquitted conduct without violating *Beck*[2] so long as the court does not rely on the acquitted conduct when sentencing the defendant. *Beck* supports this conclusion. In *Beck*, our Supreme Court remanded for resentencing because the sentencing court unquestionably "relied" on acquitted conduct for its sentencing decision. A sentencing court that reviews a [presentence investigation report] that merely contains information about acquitted conduct, however, does not necessarily rely on such information when sentencing a defendant. There must be some evidence in the record that the sentencing court relied on such information to warrant finding a *Beck* violation. Had the sentencing court specifically referenced acquitted offenses as part of its sentencing rationale, a *Beck* violation would be apparent. But when [presentence investigation reports] prepared by the Department of Corrections merely refer to an acquittal by a jury of offenses in a separate case, and the sentencing court does not refer to or expressly rely upon such acquitted offenses as part of its sentencing rationale, this Court cannot conclude that the sentencing court committed a *Beck* violation because such a conclusion would rest on speculation that acquitted conduct influenced the sentencing court's decision. [*Id.* at 311-312 (citation omitted).]

[2] *People v Beck*, 504 Mich 605, 618; 939 NW2d 213 (2019).

Under *Stokes*, information about AE need not be stricken from the presentence investigation report merely because it involves acquitted conduct. Defendant does not argue on appeal, and the record does not suggest, that the trial court relied on the information related to AE when sentencing defendant. Absent some indication that the trial court improperly relied on this information, defendant cannot show error related to acquitted conduct. See *id.*

Although acknowledging this Court's decision in *Stokes*, defendant asserts that *Stokes* is not dispositive of his arguments because *Stokes* did not address whether information related to acquitted conduct is relevant. Information that is irrelevant or inaccurate should not be included in the presentence investigation report. See *People v Waclawski*, 286 Mich App 634, 690; 780 NW2d 321 (2009). But it is also true that the scope of the presentence investigation report, as an information-gathering tool, is "necessarily broad." *Morales v Mich Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003). Under MCR 6.425(A)(1)(b), the presentence investigation report must include "a complete description of the offense *and the circumstances surrounding it*." (Emphasis added). Information regarding the investigation of an offense forms part of the circumstances surrounding an offense, and such information is not excludable merely because the investigation also involved other crimes. That is, as detailed in the presentence investigation report, it was AE's allegations of abuse that prompted the involvement of Children's Protective Services and the police, and it was AE's disclosure to NE and the authorities' investigation into AE's allegations that prompted NE's own disclosures of the abuse that constitutes the basis for defendant's conviction. In this context, the investigation of AE's allegations—as the catalyst for and part of—the investigation of NE's complaint against defendant formed part of the circumstances surrounding the offense. This information was properly included in the broad scope of the presentence investigation report under MCR 6.425(A)(1)(b). Thus, defendant is not entitled to a remand to have information related to AE struck from the presentence investigation report. Having concluded that there was no error in the inclusion of this information in the presentence investigation report, we also conclude that any objection from trial counsel would have been futile and, therefore, cannot establish ineffective assistance of counsel. See *Thomas*, 260 Mich App at 457.

F. LIFETIME ELECTRONIC MONITORING

Lastly, defendant argues that the trial court erred by subjecting defendant to lifetime electronic monitoring. According to defendant, the imposition of lifetime electronic monitoring in this case violates ex post facto prohibitions, it required fact-finding by the jury to determine the date of his offense, and it was improper because defendant was not given notice that he could be subject to lifetime electronic monitoring. The prosecutor agrees, conceding that NE's trial testimony does not definitively establish that the sexual abuse occurred before August 28, 2006, the effective date of 2006 PA 169 which enacted the lifetime-electronic-monitoring penalty. Defendant failed to raise this issue at the trial-court level and, therefore, it is unpreserved and reviewed for plain error. See *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012), aff'd 495 Mich 33 (2014).

As already recognized by the Michigan Supreme Court, lifetime electronic monitoring is "an additional punishment and part of the sentence itself when required by the CSC–I or CSC–II statutes." *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012). As punishment, the addition of the lifetime electronic monitoring to the sentencing scheme for CSC-I constituted an increase

in punishment subject to ex post facto prohibitions. See *People v Wiley*, 324 Mich App 130, 153-154; 919 NW2d 802 (2018). NE testified that defendant repeatedly sexually abused NE between 2004 and 2008, but NE could not specify when any single instance of sexual abuse occurred. Thus, the prosecutor failed to establish that any instance of sexual abuse occurred before August 28, 2006. Thus, lifetime electronic monitoring would be an impermissible ex post facto punishment. This error was plain and it affected defendant's substantial rights. Accordingly, we remand with instructions to amend defendant's judgment of sentence to remove the lifetime-electronic-monitoring requirement. Having concluded that defendant is entitled to relief on ex-post-facto grounds, we find it unnecessary to address defendant's additional argument related to lifetime electronic monitoring.

III. CONCLUSION

We affirm defendant's conviction and deny defendant's motion to remand. We remand to the trial court solely to correct the judgment of sentence to strike the imposition of lifetime electronic monitoring. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Kirsten Frank Kelly
/s/ Brock A. Swartzle

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LEE MONTEZ
(Print your name)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank)

Court of Appeals No. 353119
(See Court of Appeals decision)

Trial Court No. 19-003225-FC
(See Court of Appeals brief or PSIR.)

MOTION TO WAIVE FEES

For the reasons stated in the affidavit of indigency below, I request that this Court GRANT a waiver pursuant to MCR 7.319(C) of all fees required for filing the attached pleading because I am indigent and the provisions of MCL 600.2963 requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction.

3-20-22
(Date)

(Sign your name)

STEVEN LEE MONTEZ 732213
(Print your name and, if incarcerated, MDOC number)

AFFIDAVIT OF INDIGENCY

My name and MDOC number (if incarcerated) are STEVEN LEE MONTEZ 732213.

I am incarcerated at GUS HARRISON CORRECTIONAL FACILITY in ADRIAN, MI, 49221.
(Name of correctional facility) (City, state and zip code)

I attest that I cannot pay the filing fee. (Check the boxes that apply to you.)

- ☐ My only source of income is from my prison job and I make $_____ per day.
- ☒ I have no income.
- ☒ I have no assets that can be converted to cash.
- ☒ The Court of Appeals waived my fees in that court.

I declare that the statements above are true to the best of my knowledge, information and belief.

(Sign your name)

3-20-22
(Today's date)

STEVEN LEE MONTEZ
(Print your name and, if incarcerated, MDOC number)

GUS HARRISON CORRECTIONAL FACILITY
(Print name of correctional facility if incarcerated)

2727 E. BEECHER ST.
(Print your address or address of correctional facility)

ADRIAN, MI 49221

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CLERK SUPREME COURT

Page 11

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LEE MONTEZ
(Print your name)

Defendant-Appellant.

Supreme Court No. _____ (Leave blank)

Court of Appeals No. 353119 (See Court of Appeals decision)

Trial Court No. 19-003225-FC (See Court of Appeals brief or PSIR)

PROOF OF SERVICE

On April 2, 2022, I mailed by U.S. mail 1 copy of the documents checked below:

- ☑ Application for Leave to Appeal
- ☑ Copy of Trial Court decision being appealed
- ☑ Copy of Court of Appeals decision being appealed
- ☐ PSIR (required **only** if you are raising an issue related to the sentence imposed on your conviction **and** the PSIR was not previously filed with the Court of Appeals)
- ☐ Transcript of jury instructions (required **only** if you are raising an issue related to a jury instruction at trial **and** the transcript was not previously filed with the Court of Appeals)
- ☑ Motion to Waive Fees / Affidavit of Indigency
- ☑ Proof of Service
- ☑ Other: Appellant Brief

****You do not have to provide any briefs or other documents filed in the trial court or Court of Appeals****

TO: KENT County Prosecutor
(Name of county)

82 IONIA AVENUE NW, SUITE 450
(Street address)

GRAND RAPIDS, MI 49503
(City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

(Sign your name)

April 2
(Today's date)

STEVEN LEE MONTEZ 732213
(Print your name and, if incarcerated, MDOC number)

GUS HARRISON CORRECTIONAL FACILITY
(Print name of correctional facility if incarcerated)

2727 E. BEECHER ST.
(Print your address or address of correctional facility)

ADRIAN, MI 49221

RECEIVED
APR 04 2022
LARRY S. ROYSTER
CLERK SUPREME COURT

COVER LETTER

April 2, 2022
(Date of mailing to the Supreme Court)

Clerk's Office
Michigan Supreme Court
Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: PEOPLE OF THE STATE OF MICHIGAN v STEVEN LEE MONTEZ
(Print your name)

Supreme Court No. _____ (Leave blank - the Clerk will assign a number for you.)

Court of Appeals No. 353119 (Get this number from the Court of Appeals decision.)

Trial Court No. 19-003225-FC (Get this number from Court of Appeals brief or the PSIR.)

Dear Clerk:

Enclosed please find the originals of the documents checked below. (Put a check mark in the boxes of the documents you are sending.) I am indigent and cannot provide four copies.

- [x] Application for Leave to Appeal
- [x] Copy of Trial Court decision
- [x] Copy of Court of Appeals decision
- [ ] PSIR (required **only** if you raise an issue related to the sentence imposed on your conviction **and** the PSIR was not previously filed with the Court of Appeals)
- [ ] Transcript of jury instructions (required **only** if you are challenging an instruction on appeal **and** the transcript was not previously filed with the Court of Appeals)
- [x] Motion to Waive Fees / Affidavit of Indigency
- [x] Proof of Service
- [x] Other Appellant Brief

****You do not have to provide any briefs or other documents filed in the trial court or Court of Appeals****

(Sign your name)

STEVEN MONTEZ - 732213
(Print your name and, if incarcerated, MDOC number)

GUS HARRISON CORRECTIONAL FACILITY
(Print name of correctional facility if incarcerated)

2727 E. BEECHER ST.
(Print your address or address of correctional facility)

ADRIAN, MI 49221

Copy sent to:
KENT COUNTY PROSECUTOR

INSTRUCTIONS

1. You will need 2 copies and the originals of this letter and the pleadings listed above.
2. Mail the originals of this letter and the pleadings to the Supreme Court Clerk.
3. Mail 1 copy of this letter and the pleadings to the prosecutor.
4. Keep 1 copy of this letter and the pleadings for your file.