If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2026 1:25 PM
v	No. 375365 Macomb Circuit Court
LARRY DEVERE MIDDLETON, Defendant-Appellant.	LC No. 2023-002768-FC

Before: LIEVENSE, P.J., and SWARTZLE and MARIANI, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (person under 13 years); one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (person under 13 years; defendant 17 years or older); one count of assault with intent to commit criminal sexual conduct (AICSC), MCL 750.520g(1); and one count of indecent exposure, MCL 750.335a(1). Defendant challenges the trial court's decision to limit defense counsel's questioning of the complainant's mother that was intended to impeach the complainant, and alternatively, that defense counsel was ineffective for failing to lay a proper foundation for the questions. We disagree and affirm.

I. FACTUAL BACKGROUND

In 2023, the complainant reported that when she was 11 years old, defendant, her adopted father, touched her vagina, breast, and buttocks in a sexual manner multiple times, digitally penetrated her more than once, exposed himself to her multiple times, and attempted to force her to fellate him. The complainant eventually disclosed the abuse to her mother, saying it happened three or four times. The complainant's mother confronted him with the allegations, and defendant admitted to touching the complainant in a sexual manner but denied that any digital penetration occurred. After informing the police of the allegations, the complainant gave a forensic interview during which she reported the abuse occurred.

At trial, the prosecutor presented testimony from multiple witnesses, texts between defendant and the complainant's mother, and a video recording of defendant's interview with Detective Lindsey Pappas. During her trial testimony, the complainant stated that defendant

touched her sexually "[m]ore than ten times," which was more than she had said previously. She testified further that she had disclosed the abuse to her mother in late August 2023 at the family home one morning before school. On cross-examination, defense counsel impeached the complainant by getting her to agree that she had originally claimed during a forensic interview that sexual contact occurred a fewer number of times. However, defense counsel did not ask the complainant whether she had previously told her mother how many times and under what circumstances the abuse occurred.

Then, the complainant's mother testified. On cross-examination, she admitted that the complainant initially told her that the abuse had occurred three to four times as opposed to the "ten or 20" times the complainant testified to at trial. The defense attorney continued this line of questioning, asking several questions without objection about how many times the complainant had told her mother that defendant had touched her sexually. Eventually the prosecutor objected on hearsay grounds when defense counsel started asking about details of what the complainant had told her about the instances of sexual abuse. Defense counsel asserted he was trying to impeach the complainant with her prior inconsistent statement to her mother, a non-hearsay purpose, and the prosecutor argued that defense counsel had failed to lay a proper foundation for the questioning because he had not asked the complainant about what she had told her mother. Defense counsel responded by arguing that a foundation had been laid because he had directly asked the complainant how many times the abuse occurred and that her testimony differed from what she had told her mother. He also argued that he had given the complainant an opportunity to explain or deny her testimony regarding the number of occasions of abuse, as required by MRE 613. After much discussion, the trial court sustained the objection on hearsay grounds.

During Detective Pappas's testimony, the prosecutor played the recording of her interview of defendant, during which he admitted, among other things, to touching the complainant's vagina and buttocks, was vague as to other details, but denied any penetration. Detective Pappas also testified that she had interviewed the complainant's mother during her investigation of the complainant's allegations. On cross-examination, defense counsel asked Detective Pappas if she was aware that the complainant had previously stated that only "three to four incidents" of abuse had occurred, and she agreed, acknowledging that she must have learned that from the complainant's mother, since she did not interview the complainant.

During closing argument, defense counsel highlighted the inconsistency between the complainant's testimony at trial regarding how many times defendant abused her and the testimony about what the complainant had previously reported to argue that the jury should not believe the complainant about whether penetration had occurred. The jury returned a guilty verdict on all counts, and the court sentenced defendant to 25 years to 75 years for the two CSC-I convictions, 71 months to 180 months for the CSC-II conviction, 50 months to 120 months for the AICSC conviction, and 365 days for the indecent exposure conviction.

This appeal followed.

II. IMPEACHMENT EVIDENCE

Defendant argues that the trial court erred when it prohibited defense counsel from further questioning the complainant's mother for the purpose of impeaching the complainant, relying on

MRE 613 governing the admissibility extrinsic evidence of a witness's prior statement. We disagree.

This Court reviews evidentiary issues for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). Any preliminary questions of law are reviewed de novo. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012), citing *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A preserved trial error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *King*, 297 Mich App at 472, citing *Lukity*, 460 Mich at 495-496.

Impeachment by extrinsic evidence is governed by MRE 613 "subject to certain restrictions." *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). MRE 613(b), which concerns extrinsic evidence of a prior inconsistent statement, states as follows:

> Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subrule does not apply to an opposing party's statement under Rule 801(d)(2).

Under this rule, before offering extrinsic evidence to impeach, the litigant must lay a proper foundation. *People v Butsinas*, ___ Mich ___, ___; ___ NW3d ___ (2025) (Docket No. 364778); slip op at 7. "[A] proper foundation must be laid by questioning the witness concerning the time and place of the statement and the person to whom it was allegedly made." *Rodriguez*, 251 Mich App at 10 (citations omitted). Our Supreme Court has explained that the proponent must first elicit testimony inconsistent with the prior statement, ask the witness to admit or deny both statements, allow an explanation, and permit cross-examination by the opposite party. *Butsinas*, ___ Mich App at ___; slip op at 7, citing *Barnett v Hidalgo*, 478 Mich 151, 165, 732 NW2d 472 (2007).

Here, defendant's argument fails for several reasons. As the record makes clear, defense counsel cross examined the complainant's mother with several questions about what the complainant had previously told her about the number of times defendant touched her (3-4 times), effectively eliciting hearsay impeachment testimony without drawing an objection. That number was different than what the complainant had testified to at trial, meaning at that point the defense had elicited the testimony it needed to argue that the complainant was lying. It was only when defense counsel asked the complainant's mother more questions about the surrounding circumstances related to the abuse the complainant disclosed to her mother that the prosecution objected. But defendant does not identify any "inconsistent" statements defense counsel would have elicited on that topic.

Moreover, defense counsel failed to properly establish a foundation for further questioning the complainant's mother about the circumstances of the abuse because he never elicited testimony from the complainant about what she told her mother and only elicited that what she reported during her forensic interview may have been different than what she was now testifying to at trial.

Defendant now argues that defense counsel should have been permitted to impeach the complainant by asking her mother about the complainant having specifically reported to her mother that the abuse occurred three to four times rather than the "more than ten times" she testified about at trial. Setting aside that the record shows defense counsel did so, the expected testimony was not inconsistent. The complainant testified during direct examination that she disclosed the abuse to her mother in late August 2023. In turn, defense counsel questioned the complainant about whether she had disclosed the abuse to her mother at her home in late August 2023, and he also received an affirmative response. But the complainant did not testify that she had told her mother that the abuse had occurred a specific number of times–she only testified affirmatively on cross-examination that she might have given a different response as to the number of times she was abused during her forensic interview. Thus, defense counsel, as the proponent, did not elicit testimony from the complainant that was inconsistent with the complainant's prior statement to her mother, and defense counsel thereby failed to lay a proper foundation for questioning the mother. *Butsinas*, ___ Mich App at ___; slip op at 7.

Instead, during cross-examination, when the complainant was asked if she remembered whether she had disclosed how many times the abuse had occurred during her forensic interview, the complainant responded that she did not remember but had told the truth. When asked whether, if she had told the forensic interviewer "something different" than what she had testified about earlier, it would be because she "remembered it better then," the complainant responded affirmatively.

This exchange does not demonstrate that the complainant's prior statements about what she had told her mother were inconsistent with her testimony that ten or more acts of abuse occurred because she did not remember her prior statements and was never confronted at trial with the statements she gave during her forensic interview about the abuse. "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Shaw*, 315 Mich App 668, 683; 892 NW2d 15 (2016) (quotation marks and citation omitted). "The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to the prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). But even when a witness claims not to remember making a prior inconsistent statement, the proponent of the evidence must still lay a proper foundation to impeach the witness through extrinsic evidence. *Rodriguez*, 251 Mich App at 34. Again, defense counsel did not lay a proper foundation to impeach the complainant regarding her prior statements because he did not ask her how many incidents or the circumstances of abuse she reported to her mother. As a result, the complainant was never given an opportunity to admit or deny any statement she made during her forensic interview in that regard. *Butsinas*, ___ Mich App at ___; slip op at 7.

In this context, the trial court did not abuse its discretion by sustaining the prosecutor's objection and not permitting defense counsel to elicit more testimony from the complainant's mother to impeach the complainant.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in the alternative that his attorney's failure to question the complainant about her prior statements to her mother about the number of instances of inappropriate touching

constituted ineffective assistance of counsel. Although we agree defense counsel failed to lay this proper foundation to support later eliciting impeachment evidence, we disagree that he was ineffective because he elicited testimony from the complainant's mother and Detective Pappas to impeach the complainant's testimony.

In general, "[a] claim of ineffective assistance of counsel involves mixed questions of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). A trial court's findings of fact, if any, are reviewed for clear error and legal questions are reviewed de novo. *People v Ogilvie*, 341 Mich App 28, 34; 989 NW2d 250 (2022). When a defendant did not raise this claim in a motion for a new trial or a request for a *Ginther*[1] hearing, this Court's "review is limited to mistakes apparent from the record." *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Shaw*, 315 Mich App at 672, citing *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted). "This Court will not find trial counsel ineffective when an objection would have been futile; nor will it second-guess matters of trial strategy." *Ogilvie*, 341 Mich App at 34 (citations omitted).

Defendant argues that his trial counsel was ineffective because he failed to question the complainant about her prior statement to her mother regarding the number of times she was abused, which was inconsistent with her trial testimony about the number of times she was abused. His argument is misplaced, however, because trial counsel elicited that exact testimony from complainant's mother and from Detective Pappas. Specifically, Detective Pappas testified on cross examination that she was aware that the complainant had told her mother that the abuse had occurred three to four times because the information was included in a report she had written summarizing her interview of the mother. The prosecutor did not object to this line of questioning. Defense counsel also elicited from the complainant's mother that the complainant had told her about three to four instances of abuse, not ten or more as the complainant had testified. As a result of this testimony, defense counsel argued in closing that the complainant had been "changing [her] story" and that the jury had "heard evidence that [the complainant] said three or four times this happened," not the higher number of times the complainant had testified to at trial. He argued further that the complainant could not be believed because she was "saying three or four different times . . . and then, as the story goes on, . . . now it's ten, you know. Some of them were penetration, some of them were not."

The record therefore reveals defense counsel was not ineffective because he was able to impeach the complainant by showing that her trial testimony was different than what she had said

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

before. Defense counsel did not fail to present evidence of or argue the relevance of the complainant's prior inconsistent statement. This impeachment evidence was admitted, and the jury convicted him anyway. Thus, defendant cannot demonstrate that trial counsel's performance was objectively deficient or that, but for counsel's claimed deficiency, it is reasonably probable that the outcome of his trial would have been different. *Shaw*, 315 Mich App at 672.

Affirmed.

/s/ Andrew J. Lievense
/s/ Brock A. Swartzle
/s/ Philip P. Mariani