No. 24-

IN THE

Supreme Court of the United States

ANDREW THOMAS COWHY,

Petitioner,

v.

MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the Court reexamine its holding in *Oregon v. Ice*, 555 U.S. 160 (2009), which exempts factual findings necessary to increase a defendant's punishment through the imposition of consecutive sentences from the Sixth Amendment jury requirement?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

There are no related proceedings to this criminal case.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

PETITION FOR WRIT OF CERTIORARI

Andrew Cowhy respectfully petitions this Court for a writ of certiorari to review the final order of the Michigan Supreme Court.

OPINIONS BELOW

The Michigan Supreme Court's order denying review is reported at 9 N.W.3d 524 (Mem) (Mich 2024) and reproduced at Appendix A, 1a. The Michigan Court of Appeals opinion is unreported and reproduced at Appendix B, 2a. The trial court's judgment is reproduced at Appendix C, 33a.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of this Court's rules. The Michigan Supreme Court's order denying Mr. Cowhy's application was entered on August 2, 2024. On October 22, 2024, Justice Kavanaugh extended the time for filing this petition to December 30, 2024. This petition is timely filed pursuant to Supreme Court Rule 13.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

The Fourteenth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Michigan Compiled Laws Section 750.520b(3) provides that:

> The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

INTRODUCTION

In Michigan, "concurrent sentencing is the norm," a "consecutive sentence may be imposed only if specifically authorized by statute." *People v. Brown*, 220 Mich. App. 680, 682, 560 N.W.2d 80 (1996). One statute authorizing consecutive sentencing is MCL 750.520b, which authorizes a sentencing court to impose a consecutive sentence for any first-degree criminal sexual conduct conviction "arising from the same transaction" as another offense. MCL 750.520b(3).

Following a jury trial, Thomas Cowhy was convicted of five counts of first-degree criminal sexual conduct and five counts of second-degree criminal sexual conduct. The trial court ordered that three of his first-degree criminal sexual conduct sentences run consecutive to one another, resulting in a sentence of 75 to 150 years, 25 to 50 years on each sentence.

On the three counts that resulted in a concurrent sentence, the jury made no finding that they arose "from the same transaction" as required by 750.520b(3). To make that finding, the trial court relied in part on the post-trial affidavit of the victim and judicially found the necessary facts to impose consecutive sentences. *People v. Cowhy*, Pet. App. at 8a.

The Michigan courts have relied on this Court's decision in *Oregon v. Ice*, 555 U.S. 160 (2009), to authorize this sort of judicial fact-finding. However, since *Oregon v. Ice* was decided, this Court's Sixth Amendment jurisprudence has evolved, and that case is incompatible with the Court's subsequent decision in *Alleyne v. United States*, 570 U.S. 99 (2013). This Court should grant certiorari to reconsider the application of the Sixth Amendment to the imposition of consecutive sentences.

STATEMENT OF THE CASE

In 2015, Thomas Cowhy was charged with the sexual abuse of his nieces and nephews. He initially pleaded guilty to three counts of first-degree child abuse, six counts of second-degree criminal sexual conduct, three counts of third-degree criminal sexual conduct, and one count of accosting a minor for immoral purposes. He received a sentence of 10 to 15 years' imprisonment.

After successfully moving to withdraw his plea, he elected to proceed to trial. He was convicted of five counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and five counts of second-degree criminal sexual conduct (CSC-II) MCL 750.520c(1)(a)—three of his CSC-I charges related to his alleged abuse of his niece

AC. The jury found that he committed those offenses between August 28, 2006, and 2012 but did not find that they occurred on any particular date or the same date.

At sentencing, the prosecution presented an affidavit of AC attempting to clarify that multiple instances of sexual penetration occurred during the same encounter.

Michigan law only allows the imposition of consecutive sentences when specifically authorized by statute. The CSC-I statute authorizes consecutive sentences when the offenses occurred as part of the same transaction: MCL 750.520b(3). Over the defendant's objection, the trial court imposed the three sentences related to the abuse of AC consecutively, for a sentence of 75 to 150 years.

Mr. Cowhy appealed his conviction and sentence to the Michigan Court of Appeals and the Michigan Supreme Court, arguing that the imposition of consecutive sentences without a jury finding that the offenses were part of the same transaction violated his Sixth Amendment right to trial by jury. The Michigan courts denied relief, relying on this Court's decision in *Oregon v. Ice*, 555 U.S. 160 (2009), to authorize judicial fact-finding to support consecutive sentences.

REASON FOR GRANTING THE WRIT

I. This Court should revisit its holding in *Oregon v. Ice* in light of its more recent Sixth Amendment sentencing decisions. The Court should follow the expansion of defendants' Sixth Amendment rights in *Alleyne v. United States* and clarify that the Sixth Amendment right to a jury trial applies to increased punishment stemming from the ability to apply consecutive sentencing.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court ruled that any factor that results in an increased maximum sentence is an element of the offense that must be proven to a jury beyond a reasonable doubt. *Apprendi* involved a statute that increased both the minimum and maximum sentences for possession of a firearm for unlawful purposes based on a judicial finding that the possession was in relation to a hate crime.

After the Court's decision in *Apprendi*, defendants sought to apply its holding to other increased punishment. One of the first post-*Apprendi* challenges involved mandatory minimum sentences. In *Harris v. United States*, the Court found that brandishing a firearm under 18 U.S.C. § 924(c), which criminalizes the use or carrying of a firearm in relation to a crime of violence, was not an element of the crime even though it increases the mandatory minimum sentence for that offense from five to seven years. The Court held the Sixth Amendment was not applicable because the statute did not increase the defendant's maximum punishment. 536 U.S. 545 (2002), overruled by *Alleyne v. United States*, 570 U.S. 99 (2013).

The Court found that a finding that the defendant brandished a firearm was more consistent with traditional sentencing factors rather than an element of the crime.

> The provisions before us now, however, have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion. Section 924(c)(1)(A) does not authorize the judge to impose "steeply higher penalties"—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm. The incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration.

Harris at 554.

In *Oregon v. Ice*, this Court rejected a challenge to statutes authorizing consecutive sentences on similar grounds. 555 U.S. 160 (2009). Like Michigan, Oregon had a sentencing scheme that required concurrent sentencing unless the sentencing court made certain factual determinations. *Ice*, 555 U.S. at 165. An Oregon sentencing court found that Ice had met the factual requirements and imposed consecutive sentences.

Denying Ice's request to overturn his sentence on Sixth Amendment grounds, this Court did not extend *Apprendi's* jury finding requirement to concurrent/consecutive sentencing determinations because: "[t]hese twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law.'" *Ice*, 555 U.S. at 168, quoting *Apprendi*, 530 U.S., at 477.

Harris remained the law for less than eleven years. In *Alleyne v. United States*, the Court reexamined *Harris* and found that it could not reconcile the decision with *Apprendi*. In *Alleyne* the Court ruled that: "While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi* 's definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Alleyne*, 570 U.S. at 108.

Alleyne makes clear that "any fact that aggravates the legally prescribed range of allowable sentences . . . constitutes an element of a separate, aggravated offense that must be found by the jury[.]" *Id.* at 115.

Michigan's CSC-I offense carries a sentencing range of 25 years to life. Convictions for multiple CSC-I offenses run concurrently under Michigan law unless they are committed as part of the same transaction as another crime. In a case like Mr. Cowhy's, where multiple CSC-I

convictions are charged, a finding that the offenses were committed as part of the same transaction increases the minimum sentence from 25 years to at least 50 years, or in Mr. Cowhy's case, 75 years.

There can be no doubt that a finding that the offenses occurred as part of the same transaction "aggravates the legally prescribed range of allowable sentences" and allows the judge to impose "steeply higher penalties." *Alleyne* did away with *Harris's* traditional sentencing factor analysis and held that facts that increase punishment are elements. If a factual finding aggravates the sentencing range, that factual finding is an element of the offense under *Alleyne.*

This Court reconsidered *Harris* twelve years ago and, after allowing it to stand for eleven years, decided it was wrongly decided. *Oregon v. Ice* was decided fifteen years ago. It is time to overrule that case and, consistent with *Apprendi* and *Alleyne*, require facts that aggravate a defendant's sentencing range by allowing consecutive sentencing to be found by a jury.

The Sixth Amendment's purpose is to "preserve the historic role of the jury as an intermediary between the State and criminal defendants." *Alleyne* 570 U.S. at 114. The difference between a 25- and 75-year minimum sentence is astronomical. Under *Apprendi* and *Alleyne*, Mr. Cowhy's jury, not a state actor such as a judge, should have determined any facts that increased this minimum.

CONCLUSION

For the foregoing reasons, Petitioner Andrew Cowhy asks that a writ of certiorari issue to review the judgment of the Michigan Supreme Court.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE MICHIGAN SUPREME COURT, FILED AUGUST 2,2024

MICHIGAN SUPREME COURT

SC: 166400
COA: 360167
St Clair CC: 15-002000-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ANDREW THOMAS COWHY,

Defendant-Appellant.

Filed August 2, 2024

ORDER

On order of the Court, the application for leave to appeal the October 12, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 2, 2024 /s/ Larry S. Royster
Clerk

APPENDIX B — OPINION OF THE STATE OF MICHIGAN COURT OF APPEALS, DECIDED OCTOBER 12, 2023

STATE OF MICHIGAN
COURT OF APPEALS

No. 360167
St. Clair Circuit Court LC No. 15-002000-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW THOMAS COWHY,

Defendant-Appellant.

Decided October 12, 2023

Before: MURRAY, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his convictions and sentences, following a jury trial, of five counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and five counts of second-degree criminal sexual conduct (CSC-II) MCL 750.520c(1)(a). The trial court sentenced defendant to prison terms of 25 to 50 years for four of the CSC-I convictions, 18 to 50 years for the other CSC-I conviction, and 10 to 15 years for each CSC-II conviction.

Appendix B

The trial court ordered three of the 25-to-50-year CSC-I sentences to be served consecutively, and all other sentences to be served concurrently. We affirm.

I. BACKGROUND

Defendant's convictions arise from the sexual abuse of four of his nieces and nephews, AC, CC, AB, and JC. Another niece, KC, also testified that defendant sexually abused her as a child, but defendant was not charged with any offense involving KC, whose testimony was offered as other acts evidence under MRE 404(b)(1). The jury found that the abuse occurred between December 2005 and 2012, when defendant was over the age of 17 and all of the victims were under the age of 13.

After defendant was initially charged in 2015, he pleaded guilty to three counts of first-degree child abuse, MCL 750.136(b)(2), six counts of CSC-II, three counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d, and one count of accosting a minor for immoral purposes, MCL 750.145a. Defendant was sentenced in November 2015 to sentences of 10 to 15 years' imprisonment for each of his CSC-II and CSC-III convictions. He then unsuccessfully moved to withdraw his guilty plea, which resulted in an appeal to this Court. In that appeal, a panel of this Court held that defendant was entitled to withdraw his guilty plea "in its entirety" because he was convicted of first-degree child abuse under a version of the statute that took effect after the offenses were completed in violation of the Ex Post Facto Clause. *People v Cowhy*, unpublished per curiam opinion

of the Court of Appeals, issued July 31, 2018 (Docket No. 334140), pp 5-7.

On remand, after the trial court advised defendant of the potential significant consequences of withdrawing his guilty plea—including that he could be subject to mandatory 25-year minimum sentences if convicted of CSC-I—defendant elected to withdraw his guilty plea.

Before the case was tried, the prosecution filed a motion requesting that it be allowed to admit at trial a redacted affidavit that defendant had submitted in support of his request to withdraw his guilty plea. In the affidavit, defendant claimed that the offenses that he pleaded guilty to all occurred when he was under the age of 17. The trial court ruled that the affidavit was inadmissible under MRE 410, which prompted the prosecutor to file an interlocutory application for leave to appeal. This Court ultimately granted leave and held that the trial court erred by excluding the affidavit under MRE 410, and further held that the redacted affidavit was not required to be excluded under MRE 403. *People v Cowhy*, 330 Mich. App. 452, 457; 948 N.W.2d 632 (2020).

The case proceeded to trial on five counts of CSC-I and five counts of CSC-II. At trial, the jury was presented with a verdict form that separately listed each of the charged counts along with the victim and conduct associated with each count. For each of the CSC-I counts, the verdict form provided the jury with the options of finding defendant not guilty, or guilty of alternative options of CSC-I. One alternative guilty option required the jury to find that

defendant committed CSC-I of a person under the age of 13 while defendant was 17 years of age or older. That option further required the jury to find whether each offense was committed (1) between August 28, 2006 and 2012,[1] or (2) between December 1, 2005 and August 27, 2006. The second alternative guilty option allowed the jury to find defendant guilty of CSC-I by finding that defendant committed the offense between December 1, 2002 and November 30, 2005.[2] The jury found defendant guilty of five counts each of CSC-I and CSC-II. The verdict form reflects the following verdicts for the five CSC-I counts:

Count	Victim	Charged Conduct	Verdict
Count 1	AC	Oral/Penile Penetration	Guilty—offense committed between August 28, 2006 and 2012, victim under age 13, and defendant age 17or older.

1. The significance of the August 28, 2006 date is that MCL 750.520b was amended by 2006 PA 165, effective August 28, 2006, to (1) require a mandatory 25-year minimum sentence for a violation committed by an individual 17 years of age or older against an individual less than 13 years of age, and (2) authorize a court to order a sentence imposed for CSC-I "to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." See MCL 750.520b(2) and (3).

2. The significance of these dates is that defendant attained the age of 17 years old on December 1, 2005.

Appendix B

Count	Victim	Charged Conduct	Verdict
Count 2	AC	Penile/Genital Penetration	Guilty—offense committed between August 28, 2006 and 2012, victim under age 13, and defendant age 17 or older.
Count 4	CC	Oral/Penile Penetration	Guilty—offense committed between August 28, 2006 and 2012, victim under age 13, and defendant age 17or older.
Count 7	AB	Penile/Anal Penetration	Guilty—offense committed between December 1, 2005 and August 27, 2006, victim under age 13, and defendant age 17 or older.
Count 11	AC	Digital Penetration	Guilty—offense committed between August 28, 2006 and 2012, victim under age 13, and defendant age 17 or older.

For the one CSC-I conviction involving conduct committed between December 1, 2005 and August 27, 2006 (Count 7 above), the trial court sentenced defendant to a prison term of 18 to 50 years. For the remaining four CSC-I convictions (Counts 1, 2, 4, and 11 above) involving conduct committed between August 28, 2006 and 2012, the trial court sentenced defendant to prison terms of 25 to 50 years each. For each CSC-II conviction, the court sentenced defendant to 10 to 15 years' imprisonment. Finally, for the three CSC-I sentences involving offenses against AC (Counts 1, 2, and 11 above), the court ordered

the sentences to be served consecutively, with all other sentences to be served concurrently.

II. JUDICIAL FACT-FINDING, CONSECUTIVE SENTENCING, AND PROPORTIONALITY

Defendant first argues that the trial court violated his Sixth Amendment rights to a jury trial and to confront the witnesses against him by considering AC's posttrial affidavit and engaging in judicial fact-finding at sentencing to impose consecutive sentences. Defendant also argues that the trial court erred in finding that his CSC-I convictions involving AC arose from the same transaction, thereby allowing the court to impose consecutive sentences under MCL 750.520b(3). He further argues that even if consecutive sentencing was allowed, the trial court abused its discretion by finding that consecutive sentences were appropriate in this case and by failing to adequately explain its reasoning for each consecutive sentence imposed. Finally, defendant argues that the cumulative effect of his consecutive sentences—a 75-year minimum sentence—is disproportionate and violates the constitutional prohibition against cruel and unusual punishment. We reject each of these arguments.

A. STANDARD OF REVIEW

Whether the trial court violated defendant's Sixth Amendment rights by relying on AC's affidavit and engaging in judicial fact-finding at sentencing is a question of law, which this Court reviews de novo. *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502

(2015). Whether a statute authorizes a court to impose a consecutive sentence involves a question of law, which is also subject to de novo review. *People v Ryan*, 295 Mich App 388, 400; 819 NW2d 55 (2012). "When a statute grants a trial court discretion to impose a consecutive sentence, that decision is reviewed for an abuse of discretion." *People v Baskerville*, 333 Mich App 276, 290; 963 NW2d 620 (2020). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). A trial court's factual determinations at sentencing are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

B. JUDICIAL FACT-FINDING

Initially, defendant argues that the trial court erred by engaging in judicial fact-finding at sentencing—and by relying on AC's posttrial affidavit in particular—to find a factual basis for imposing consecutive sentences under MCL 750.520b(3). Defendant acknowledges that under MCL 750.520b(3), a court may only order a sentence imposed for CSC-I to be served consecutively to a term of imprisonment for another offense if the other offense arose "from the same transaction," but argues that AC's trial testimony did not establish a factual basis for finding that the multiple CSC-I convictions involving defendant's conduct against AC arose from the same transaction. Defendant contends that the trial court violated his right to a jury trial by judicially finding that the factual predicate for its authority to impose consecutive sentences

was established, and that the court's consideration of AC's affidavit violated his Sixth Amendment right of confrontation. We disagree.

The trial court relied on MCL 750.520b(3) for its authority to impose consecutive sentences in this case, which provides:

> The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

In imposing consecutive sentences, the trial court relied on *People v DeLeon*, 317 Mich App 714; 895 NW2d 577 (2016). In that case, the defendant argued that the trial court violated his Sixth Amendment rights when it engaged in judicial fact-finding to find that consecutive sentencing was permitted under MCL 750.520b(3). *DeLeon*, 317 Mich App at 721. After reviewing pertinent United States Supreme Court precedent, including *Alleyne v United States*, 570 U.S. 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), *Apprendi v New Jersey*, 530 U.S. 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Lockridge*, 498 Mich 358, this Court concluded that a defendant does not have a Sixth Amendment right to have a jury determine whether a CSC-I conviction arose from the same transaction as another offense. *DeLeon*, 317 Mich App at 721-726. In support of this conclusion, this Court relied on *Oregon v Ice*, 555 U.S. 160, 164; 129 S Ct 711; 172 L Ed 2d 517 (2016), a post-*Apprendi* case

in which the United States Supreme Court held that the Sixth Amendment did not preclude "the use of judicial fact-finding to impose consecutive sentencing." In *Ice*, 555 U.S. at 168, the Supreme Court observed that historically, the jury "played no role in the decision to impose sentences consecutively or concurrently," and therefore, "[t]he decision to impose sentences consecutively is not within the jury function" but is the "prerogative of state legislatures."

In *DeLeon*, 317 Mich App at 724, this Court noted that the United States Supreme Court decided *Alleyne* seven years after *Ice* but did not make any mention of *Ice* or do anything to disturb the holding in *Ice*. This Court further observed that *Lockridge* likewise "made no mention of *Ice* or its applicability to the trial court's ability to order, pursuant to relevant statutes, consecutive sentencing for multiple offenses." *Id.* at 725. This Court held:

> We conclude that the rationale of *Ice* should apply to Michigan's rules governing consecutive sentencing and that this rationale does not run afoul of *Lockridge*, which has its basis in *Apprendi*'s and *Alleyne*'s reasoning concerning the right to a jury trial and the protections of the Sixth Amendment. We also find persuasive the reasoning of federal courts confronted with this issue after *Apprendi* and *Alleyne*. Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense. By contrast, *Lockridge* prohibits a trial court

> only from using judge-found facts to increase "the floor of the sentencing guidelines range," and thereby the mandatory minimum sentence for an offense, and it prohibits the guidelines from being mandatory. *Lockridge*, 498 Mich at 389. No such increase occurred here, nor would the trial court's imposition of consecutive sentences be affected by whether the sentencing guidelines are mandatory or advisory.
>
> Therefore, although defendant correctly notes that the jury's verdict in this case did not necessarily incorporate a finding that his CSC-I conviction "ar[ose] from the same transaction" as did his CSC-II conviction, MCL 750.520b(3), defendant has no Sixth Amendment right to have a jury make that determination, *Ice*, 555 U.S. at 164. We discern no conflict between this holding and *Lockridge*. [*DeLeon*, 317 Mich App at 726.]

DeLeon and *Ice* are both clear in holding that a trial court is free to engage in judicial fact-finding to impose consecutive sentences without violating a defendant's Sixth Amendment rights. Although defendant suggests that these cases were wrongly decided, he does not even attempt to provide a meaningful argument in support of that claim. In any event, because *DeLeon* was decided after November 1, 1990, it is binding under MCR 7.215(J)(1), and decisions of the United States Supreme Court construing federal law are likewise binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007).

In an effort to distinguish this case from *DeLeon* and *Ice*, defendant faults the trial court for relying on AC's affidavit and, citing *Apprendi*, asserts that any facts required to enhance a sentence are elements of the offense that must be submitted to a jury. In *Apprendi*, after the defendant pleaded guilty to several offenses, the court imposed an enhanced sentence under a statutory hate crime enhancement. The defendant argued that the trial court's reliance on a statutory enhancement provision to increase his sentence beyond what was authorized for the crimes for which he pleaded guilty violated his right to a jury trial. The United States Supreme Court recognized that criminal defendants have a fundamental right to have a jury determine every element of the charged crime beyond a reasonable doubt. *Apprendi*, 530 U.S. at 471, 477. This case is distinguishable from *Apprendi* because it does not involve judicial fact-finding to increase the penalty for an offense found by the jury; rather, it involves the trial court's decision to impose a consecutive or concurrent sentence, which is outside the ambit of the jury. See *Ice*, 555 U.S. at 168. Moreover, as this Court observed in *DeLeon*, 317 Mich App at 726, "[a]lthough consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense." Therefore, we reject defendant's argument that the trial court's reliance on AC's affidavit to judicially find that consecutive sentencing was appropriate under MCL 750.520b(3) violated his Sixth Amendment rights.[3] Further, as further explained below, AC's trial

3. We also note that, to the extent that defendant argues that AC's affidavit violated his right to confrontation, this Court has held that the right to confront witnesses does not apply at

testimony was itself sufficient to authorize consecutive sentences under MCL 750.520b(3).

C. WHETHER DEFENDANT'S CSC-I CONVICTIONS INVOLVING AC AROSE FROM THE SAME TRANSACTION

Defendant next argues that the trial court erred by finding that his multiple CSC-I convictions involving AC arose "from the same transaction" as contemplated by MCL 750.520b(3). We disagree.

In *Ryan*, 295 Mich App at 402, this Court considered the meaning of "arising from the same transaction" in MCL 750.520b(3). In doing so, this Court first observed that, in the double-jeopardy context, our Supreme Court had explained that the phrase "same transaction" referred to "charges that grew out of a continuous time sequence." *Id.* (quotation marks and citation omitted). This Court then observed that our Supreme Court had construed the "analogous" statutory phrase "arising out of" to "suggest a causal connection between two events that is more than incidental." *Id.* at 403 (quotation marks and citation omitted). Employing these definitions, the *Ryan* Court held that the sexual penetrations forming two of the defendant's convictions in that case arose from the same transaction under MCL 750.520b(3) because they

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sentencing, though a defendant "must be afforded an adequate opportunity to rebut any matter that he believes to be inaccurate." *People v Uphaus*, 278 Mich App 174, 184; 748 NW2d 899 (2008) (quotation marks and citation omitted). Defendant does not contest the accuracy of AC's affidavit.

"grew out of a continuous time sequence in which the act of vaginal intercourse was immediately followed by the act of fellatio." *Id.*

Subsequently, in *People v Bailey*, 310 Mich App 703; 873 NW2d 855 (2012), this Court, citing *People v Brown*, 495 Mich 962, 963; 843 NW2d 743 (2015), held that "an ongoing course of sexually abusive conduct" would not in and of itself implicate the crimes as part of the same transaction as contemplated by MCL 750.520b(3). Rather, "[f]or multiple penetrations to be considered part of the same transaction" within the meaning of MCL 750.520b(3), they must be part of a "'continuous time sequence'" as opposed to a continuous course of conduct. *Bailey*, 310 Mich App at 725.

Here, the trial court did not err by finding that Counts 1, 2, and 11 arose from the same transaction within the meaning of MCL 750.520b(3), thereby permitting the court to impose consecutive sentences. At trial, AC testified regarding the several acts of penetration committed by defendant when she was a child. AC testified that defendant would place his penis between her thighs and against her genitals, and it would go between the folds of her skin, which she agreed was between her labia majora, causing her pain. She also testified that defendant would place his penis in her mouth and then "[h]e would move" before ejaculating on her. AC also described how defendant would touch her genitals with his fingers, which would go between the labia majora. AC further explained that defendant would engage in multiple acts of penetration at the same time, switching back and forth between

different acts. Although AC's affidavit attempted to clarify the nature and timing of the various sexual acts—and, when considered, plainly supported the imposition of consecutive sentencing—AC's trial testimony considered in its entirety, independently supports the trial court's finding that the offenses forming the basis for defendant's three CSC-I convictions involving AC had a connective relationship and were part of a continuous time sequence to justify the imposition of consecutive sentences under MCL 750.520b(3).

D. JUSTIFICATION FOR CONSECUTIVE SENTENCES

Defendant next argues that even if consecutive sentencing was authorized, the trial court abused its discretion by imposing multiple consecutive sentences and otherwise failed to articulate its reasoning for each consecutive sentence imposed to allow for meaningful appellate review. We disagree.

In Michigan, concurrent sentencing is the norm, and a trial court is only permitted to impose a consecutive sentence if specifically authorized by statute. *Baskerville*, 333 Mich App at 289-290. As indicated earlier, MCL 750.520b(3) provided the trial court with discretionary authority to order that defendant's sentences for Counts 1, 2, and 11 be served consecutively. In *Norfleet*, 317 Mich App at 664, this Court held that a decision to impose a consecutive sentence "requires that the trial court set forth the reasons underlying its decision." This requirement extends to each consecutive sentence

imposed. *Id.* at 664-665. While there are no magic words or phrases that a trial court must use when imposing consecutive sentences, the trial court is required to give "particularized reasons" for each consecutive sentence, and it must explain its reasons in sufficient detail to facilitate appellate review. *Id.* at 665-666.

Here, we conclude that the trial court did not abuse its discretion when it imposed multiple consecutive sentences, and further conclude that the trial court sufficiently explained its reasons for imposing multiple consecutive sentences. Before it issued its sentence, the trial court recognized its obligation under *Norfleet* to state on the record its reasons for each consecutive sentence imposed. The trial court proceeded to provide a lengthy explanation for its decision to impose multiple consecutive sentences, which included the extensive scope of defendant's sexual abuse of AC and the lengthy period of time over which defendant repeatedly abused her. The trial court also noted the "abhorrent" nature of the crimes, particularly considering that AC was a "defenseless" child who was 7 to 10 years old, and that defendant violated and exploited AC's trust in him as her uncle, and betrayed the trust of his own brother and sister-in-law in order to satisfy his own sexual desires. The court further considered that defendant used guilt to manipulate AC to continue to sexually abuse her, telling her that if she disclosed the abuse to anyone, she would destroy the family. The trial court also considered that, because of defendant's rampant sexual abuse, AC's innocence was stolen, she had to learn about sexual matters at a young age, and her innocence "can never be given back." The trial court also observed

that defendant committed the sexual abuse at the home of his own parents, who were AC's grandparents, which was supposed to be a safe and secure place where a child feels protected, but instead became defendant's "playground" and "house of horrors." The trial court also emphasized that it did not see any evidence that defendant had been rehabilitated. The trial court found that consecutive sentencing was absolutely "warranted and justified" in this case.[4]

In our opinion, the trial court complied with its obligation to articulate on the record its reasons for imposing the multiple consecutive sentences, and the extremely egregious facts of this particular case make it an "extraordinary" one in which multiple consecutive sentences were appropriate. *Norfleet*, 317 Mich App at 665. Accordingly, the trial court did not abuse its discretion by ordering defendant's sentences for Counts 1, 2, and 11 to be served consecutively.

E. PROPORTIONALITY AND CRUEL AND UNUSUAL PUNISHMENT

Defendant further argues that his multiple consecutive sentences are "highly disproportionate" and amount to cruel and unusual punishment under the Eighth Amendment. We disagree.

Initially, defendant's individual 25-year minimum sentences were mandated by MCL 750.520b(2)(b). As this

4. At sentencing, the court clarified that it was relying on the same rationale as justification for each consecutive sentence imposed.

Court has recognized, "[s]entences that are legislatively mandated are considered presumptively proportionate and presumptively valid." *People v Jarrell*, __ Mich App __, __; __ NW2d __ (2022) (Docket No. 356070); 2022 Mich. App. LEXIS 7019. Indeed, although a trial court's sentencing decisions are generally reviewed for an abuse of discretion and must be proportionate to the seriousness of the offense and the offender, *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), the principle of proportionality "has no applicability to a legislatively mandated sentence because the trial court, in that case, lacks any discretion to abuse," *People v Bullock*, 440 Mich 15, 34 n 17; 485 NW2d 866 (1992). The constitutional concept of proportionality, on the other hand, "concerns whether the punishment concededly chosen or authorized by the Legislature is so grossly disproportionate as to be unconstitutionally 'cruel or unusual.'" *Id.* at 34 n 17. "In determining whether a punishment is cruel or unusual, one must look to the gravity of the offense and the harshness of the penalty, compare the penalty to those imposed for other crimes in this state as well as the penalty imposed for the instant offense by other states, and consider the goal of rehabilitation." *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

In *People v Benton*, 294 Mich App 191, 817 NW2d 599 (2011), this Court held that the mandatory 25-year minimum sentence required by MCL 750.520b(3) does not qualify as cruel or unusual punishment. This Court considered the gravity and severity of offenses involving an adult offender's exploitation and victimization of children below the age of 13, that a 25-year minimum

sentence is not unduly harsh considering society's deeply ingrained social value of protecting children from sexual exploitation, and that "several other states have laws that also impose a mandatory 25-year minimum sentence for an adult offender's sexual offense against a preteen victim." *Id.* at 204-206. Thus, there is no basis for concluding that defendant's 25-year mandatory sentence is constitutionally cruel and unusual, particularly considering the scope and duration of defendant's sexual abuse.

Further, to the extent that defendant argues that the cumulative effect of his consecutive sentences, amounting to 75 years for three separate convictions of CSC-I, qualifies as disproportionate, our Supreme Court held in *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997), that "where a defendant receives consecutive sentences and neither sentence exceeds the maximum punishment allowed, the aggregate of the sentences will not be disproportionate under [*Milbourn*]." Accordingly, defendant cannot challenge the proportionality of the cumulative effect of his consecutive sentences.[5]

III. LACK OF REMORSE AND VINDICTIVENESS

Defendant argues that the trial court's decision to impose multiple consecutive sentences was impermissible based in part on the court's consideration of his lack of

5. Even if we were to consider the proportionality of defendant's sentence under *Milbourn*, however, we would conclude that it was proportional for the multitude of reasons that the trial court gave for imposing the consecutive sentences.

remorse and assertion of innocence after he had earlier pleaded guilty, and that the court acted vindictively by imposing the multiple consecutive sentences because of defendant's decision to withdraw his guilty plea and pursue his right to a jury trial. We hold that the trial court did not err to the extent that it considered defendant's lack of remorse, and that the record does not support defendant's claims that the trial court imposed consecutive sentences out of vindictiveness or because defendant decided to withdraw his guilty plea, assert his innocence, or pursue his right to a jury trial.

A. LACK OF REMORSE

In *People v Carlson*, 332 Mich App 663, 675; 958 NW2d 278 (2020), this Court observed that a trial court, when imposing a sentence, is not permitted to consider a defendant's failure to admit guilt, but may consider a defendant's lack of remorse in tailoring an appropriate sentence. See also *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995) (observing that a defendant's "absolute lack of remorse and low potential for rehabilitation" are both factors legitimately considered at sentencing). To determine whether a trial court was "improperly influenced" by a defendant's refusal to admit guilt, this Court will consider the following factors:

> (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have

> been so severe. [*People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007) (quotation marks and citation omitted).]

Here, the record does not support defendant's claim that the trial court impermissibly considered his refusal to admit guilt when determining his sentence. Indeed, defendant made no effort to maintain his innocence after trial. On the contrary, when addressing the trial court at sentencing, defendant apologized for his "sinful acts," which he primarily attributed to his youth, professed profound guilt for his conduct, and claimed that he had since grown up and become a better person. There was no effort by the court to get defendant to admit anything to demonstrate his guilt, and the court did not make any remarks directed at defendant's decisions to pursue his right to a jury trial. The record only discloses that the trial court recognized that defendant stated that he felt remorse for what he had done but found those statements to be insincere and not credible. While defendant takes issue with the trial court's finding that defendant was not remorseful, the trial court was certainly free to disbelieve defendant's expressions of remorse, and this Court generally defers to trial courts on matters of witness credibility. *People v Ziegler*, __ Mich App __, __; __ NW2d __ (2022) (Docket No. 355697); 2022 Mich. App. LEXIS 5679. Accordingly, on this record, we conclude that there is nothing to support defendant's assertions that the trial court was punishing him for asserting his innocence after initially pleading guilty or for pursuing his right to a jury trial.

Appendix B

B. VINDICTIVENESS

In *People v Warner*, 339 Mich App 125, 157; 981 NW2d 733 (2021), this Court reviewed United States Supreme Court jurisprudence addressing vindictive sentences following a defendant's successful appeal, and noted that in *North Carolina v Pearce*, 395 U.S. 711, 723-724; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part on other grounds by *Alabama v Smith*, 490 U.S. 794; 109 S Ct 2201; 104 L Ed 2d 865 (1989), the Supreme Court ruled that a sentence imposed to punish a defendant for successfully appealing a conviction is considered vindictive and violative of a defendant's due-process protections. However, the "evil" that the *Pearce* decision was aimed to protect against is the vindictiveness of the *sentencing court*, not necessarily a heightened sentence. *Warner*, 339 Mich App at 158. The Court therefore reasoned that a presumption of vindictiveness should not apply if the possibility of judicial vindictiveness is only speculative. *Id.* The Court noted that this was consistent with how courts have applied *Pearce*, explaining, "Appellate courts have declined to apply the *Pearce* presumption of vindictiveness when the reasons for the harsher sentence after a successful appeal are apparent from the surrounding circumstances." *Id.* As relevant to this appeal, this Court in *Warner* determined that "judicial vindictiveness is unlikely to have occurred when a defendant receives a higher sentence after proceeding to trial following a previous guilty plea being vacated on appeal." *Id.* at 159. This is because, even if the same judge were to impose both sentences, the information available to the sentencing judge after the plea is "'considerably less'" than what

would be available after a trial. *Id.*, quoting *Smith*, 490 U.S. at 801.

Here, defendant's assertion that the trial court vindictively imposed multiple consecutive sentences because defendant decided to withdraw his plea and pursue his right to a jury trial finds no support in the record. First, the circumstances had significantly changed after defendant withdrew his guilty plea because he was convicted at trial of more serious CSC-I offenses, which were not part of his guilty plea. Second, defendant was sentenced by a different judge than the judge who presided over his plea proceeding and previously sentenced him in 2015. Additionally, when the court sentenced defendant in 2021, it was aware of voluminous additional facts and information that were not available in 2015. By the time of sentencing, the court here had presided over a seven-day jury trial at which it heard extensive testimony regarding defendant's commission of more serious offenses that were not part of his prior guilty plea. Under these circumstances, there is no basis for applying a presumption of vindictiveness, or for concluding that the trial court's sentencing decisions were motivated by actual vindictiveness because of defendant's decision to withdraw his guilty plea and pursue his right to a jury trial.

IV. ATTORNEY-CLIENT PRIVILEGE

Defendant next argues that the trial court abused its discretion by allowing his former attorney to testify at trial. We disagree.

Appendix B

Defendant preserved his claim that the admission of his former attorney's testimony violated the attorney-client privilege by objecting on this basis at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, defendant did not raise the constitutional claims that he now raises on appeal—that the admission of his testimony violated his right to due process, his right to remain silent, and his right to the effective assistance of counsel. Accordingly, these constitutional claims are unpreserved. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion, but any concomitant questions of law, "such as whether admission of the evidence is precluded by the assertion of privilege," are reviewed de novo. *People v Hill*, 335 Mich App 1, 5; 966 NW2d 156 (2020). See also *Stavale v Stavale*, 332 Mich App 556, 560; 957 NW2d 387 (2020) (whether the attorney-client privilege applies to a communication is a question of law that this Court reviews de novo). Defendant's unpreserved constitutional claims are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011), this Court explained the nature and scope of the attorney-client privilege, stating:

> "The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents." *Reed Dairy Farm* [*v Consumers Powers Co.*, 227 Mich.

> App. 614, 618; 576 N.W.2d 709 (1998)]. "The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Id.* at 618-619. "Although either [the attorney or the client] can assert the privilege, only the client may waive the privilege." *Kubiak v Hurr*, 143 Mich App 465, 473; 372 NW2d 341 (1985).

The testimony in question did not violate the attorney-client privilege. The trial court had already admitted defendant's 2016 affidavit, which defendant had previously submitted in support of his motion to withdraw his guilty plea. In that affidavit, defendant admitted to committing "all of the sexual incidents" when he was under the age of 17. His former attorney's testimony focused not on the substance of the affidavit but on the procedural and clerical aspect of preparing an affidavit for a client. The witness testified that, as an attorney, he makes an effort to confirm the veracity and truthfulness of statements in a client's affidavit, but there was nothing in the witness's testimony that otherwise revealed any confidential or privileged communications between himself and defendant. Thus, the record does not support defendant's claim that his former attorney's testimony violated the attorney-client privilege. To the extent that defendant also asserts that the "egregious violation" of the attorney-client privilege undermined his constitutional rights to due process, to remain silent, and to the assistance of counsel, defendant's claims necessarily fail because he has not established a violation of the attorney-client privilege in the first instance.

Appendix B

V. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence at trial was insufficient to establish the requirements necessary to support imposition of a mandatory 25-year minimum sentence for his CSC-I convictions. As relevant to this issue, MCL 750.520b(2) provides, in pertinent part:

> Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> * * *
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

Defendant was alleged to have committed the charged crimes between 2002 and 2012. However, MCL 750.520(2)(b) was added by 2006 PA 165, effective August 28, 2006. Thus, for defendant to be subject to the 25-year mandatory minimum sentence prescribed by that added subsection, it was necessary for the jury to find not only that defendant was age 17 or older and his victim was under the age of 13 when defendant committed a CSC-I offense, but also that defendant committed the offense on or after August 28, 2006. Each of these requirements were submitted to the jury. With regard to the five CSC-I charges, the jury found that defendant committed four of the offenses (Counts 1, 2, 4, and 11) on or after August 28, 2006, when defendant

was age 17 or older, and his victim was under the age of 13. Those were the only convictions for which the trial court imposed the mandatory 25-year minimum sentence.

Defendant now argues that the evidence at trial was insufficient to satisfy the requirements for imposing a mandatory 25-year minimum sentence, namely, that he committed CSC-I (1) while age 17 or older, (2) against a victim under the age of 13, and (3) the offense was committed on or after August 28, 2006. We disagree.

In *People v Haynes*, 338 Mich App 392, 417; 980 NW2d 66 (2021), this Court explained:

> This Court reviews a challenge to the sufficiency of the evidence by examining the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. This Court must resolve all conflicts in the evidence in favor of the prosecution. [Quotation marks and citations omitted.]

Because the jury found that defendant's CSC-I offense against AB was committed before August 27, 2006, and the trial court did not impose a mandatory 25-year minimum sentence for that conviction, it is only necessary to consider the evidence as it relates to defendant's CSC convictions involving AC (Counts 1, 2, and 11) and CC (Count 4).

Appendix B

The evidence at trial indicated that CC was born in 2002. CC testified that defendant forced him to perform fellatio on an occasion when defendant was watching CC at CC's grandparents' house. CC stated that this incident occurred when he was between the ages of three and five, and then explained that it happened before he attended kindergarten, which he started at "about age five." The jury was specifically required to determine whether any CSC-I offense against CC was committed between December 1, 2005 and August 27, 2006, or between August 28, 2006 and 2012, and it found that the offense was committed during the latter timeframe. Viewing CC's testimony in the light most favorable to the prosecution, the jury could have found that the incident with CC occurred as late as 2007, when CC was five years old and defendant would have been more than 17 years old. Accordingly, the evidence was sufficient to establish that defendant's conviction of CSC-I involving CC was subject to the 25-year mandatory minimum sentence under MCL 750.520(2)(b).

The evidence at trial indicated that AC was born in 1999. AC testified that defendant's sexual abuse started when she was seven years old and did not stop until she was in the fifth grade, when she was 10 years old. AC would have been seven years old on August 27, 2006. She described several acts of sexual penetration committed by defendant until she was 10 years old, including acts of penile-vaginal penetration, fellatio, and digital penetration. Again, for each of the charged CSC-I offenses involving AC, the jury was specifically required to determine whether any offense was committed between December 1, 2005 and

August 27, 2006, or between August 28, 2006 and 2012, and it found that each of the offenses were committed during the latter timeframe. Viewing AC's testimony in the light most favorable to the prosecution, the jury could have found that the offenses involving AC occurred after August 28, 2006, when AC would have been seven years old and defendant would have been more than 17 years old. Accordingly, the evidence was also sufficient to establish that defendant's convictions of CSC-I involving AC were subject to the 25-year mandatory minimum sentence under MCL 750.520b(2)(b).

VI. JURY INSTRUCTIONS

For his final argument, defendant contends that the trial court erred by instructing the jury that in a CSC prosecution, time and date were not necessary elements that needed to be proved beyond a reasonable doubt. We disagree.

We review claims of instructional error de novo. *People v Spaulding*, 332 Mich App 638, 654; 957 NW2d 843 (2020). In *People v Flores*, __ Mich App __, __; __ NW2d __ (2023) (Docket No. 360584); 2023 Mich. App. LEXIS 3031, this Court explained:

> "A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006) (cleaned up). Jury instructions are to be read as a whole

> rather than extracted piecemeal to establish error. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Eisen*, 296 Mich App 326, 330, 820 NW2d 229 (2012). No error results from the omission of an instruction if the instructions as a whole covered the substance of the omitted instruction. *People v Kurr*, 253 Mich App 317, 327, 654 NW2d 651 (2002).

Jury instructions must include all elements of the charged offenses, as well as any material issues, defenses, and theories that are supported by the evidence. *Dobek*, 274 Mich App at 82. MCL 767.45(1)(b) provides that a criminal information "shall contain . . . [t]he time of the offense as near as may be." In *Dobek*, 274 Mich App at 82-83, this Court explained that in a prosecution for criminal sexual conduct involving a child victim, "[t]ime is not of the essence, nor is it a material element." The defendant in that case had argued that the trial court erred by instructing the jury that the prosecution was not required to prove the date and time of the CSC offenses, even though the information specified a four-day period in September 1995 for one offense and a time period from September to November 1995 for a second offense. *Id.* at 81. While the jury in that case had expressed confusion regarding whether the prosecution was required to prove

that the charges arising out of the first incident happened on the dates specified in the information, which were also set forth in the jury verdict form, the trial court instructed the jury that "time was not an element of the crime of criminal sexual conduct and that the prosecution need not prove the date or time of the offenses beyond a reasonable doubt." *Id.* at 81-82. This Court found no error, citing MCL 767.45(1)(b), *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990), and *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987), because the case was a CSC prosecution involving a child victim. *Dobek*, 274 Mich App at 84.

In this case, in both its preliminary and final jury instructions, the trial court informed the jury of the elements of CSC-I and CSC-II, as well as the prosecution's burden to prove the elements beyond a reasonable doubt, but further instructed the jury, consistent with M Crim JI 3.10a, that time is not an element of criminal sexual conduct and the prosecutor was not required to prove the date or time of an offense beyond a reasonable doubt. However, to the extent that the ages of the victims and defendant at the time an offense was committed were significant to determining what offense was committed and the possible penalty for that offense, the trial court further instructed the jury, when addressing each of the charged counts, that the prosecution was required to prove beyond a reasonable doubt the relevant ages of defendant and each named victim at the time of the offense. These

instructions were sufficient to protect defendant's rights. Accordingly, we reject defendant's claim of instructional error.

Affirmed.[6]

/s/ Christopher M. Murray
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle

6. In light of our decision to affirm, it is unnecessary to address defendant's additional argument that if this case is remanded for resentencing or for other proceedings, it should be reassigned to a different judge on remand.

APPENDIX C — JUDGMENT OF THE STATE OF MICHIGAN, 31ST CIRCUIT COURT, ST. CLAIR COUNTY, FILED DECEMBER 22, 2021

STATE OF MICHIGAN
31ST CIRCUIT COURT, ST. CLAIR COUNTY
201 MCMORRAN BLVD., PORT HURON, MI 48060

C/C31/S CASE NO. 15-002000-FC
ORI MI-7400153
Police Report No. 15-5519

THE PEOPLE OF THE STATE OF MICHIGAN,

v.

ANDREW THOMAS COWHY,
4680 BRICKER RD., KENOCKEE, MI 48006,
CTN/TCN 741500326801,
SID 4108488H, DOB 12/01/1988

Defendant.

Filed December 22, 2021

JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS

THE COURT FINDS:

1. The defendant was found guilty on 11/5/2021 of the crime(s) as stated below.

Appendix C

Count	CONVICTED BY			DISMISSED BY*	CRIME	CHARGES CODE(S) MCL citation/ PACC Code
	Plea*	Court	Jury			
001			X		CSC-1ST (PERSON < 13, DEFN 17 OR >	750.520B2B
002			X		CSC-1ST (PERSON < 13, DEFN 17 OR >	750.520B2B
003			X		CSC-2ND (PERSON < 13, DEFN 17 OR >	750.520C2B
004			X		CSC-1ST (PERSON < 13, DEFN 17 OR >	750.520B2B
005			X		CSC-2ND (PERSON < 13, DEFN 17 OR >	750.520C2B
006				NP	CHILDREN-ACCOSTING FOR IMMORAL PURPOSES	750.145A-A
007			X		CSC-1ST (PERSON < 13, DEFN 17 OR >	750.520B2B
008			X		CSC-2ND (PERSON < 13, DEFN 17 OR >	750.520C2B
009				NP	CHILDREN-ACCOSTING FOR IMMORAL PURPOSES	750.145A-A
010				NP	CSC-2ND DEGREE (PERSON UNDER 13)	750.520C1A
011			X		CSC-1ST (PERSON < 13, DEFN 17 OR >	750.520B2B
012			X		CSC-2ND (PERSON < 13, DEFN 17 OR >	750.520C2B
013			X		CSC-2ND (PERSON < 13, DEFN 17 OR >	750.520C2B

*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).

_____

Defendant's driver's license number

☐ 3. HIV testing and sex offender registration is completed.

☒ 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. The defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

Appendix C

Count	SENTENCE DATE	MINIMUM			MAXIMUM			DATE SENTENCE BEGINS	JAIL CREDIT	
		Years	Mos.	Days	Years	Mos.	Days		Mos.	Days
002	12/22/2021	25			50			12/22/2021		0
004	12/22/2021	25			50			12/22/2021		2337
007	12/22/2021	18			50			12/22/2021		2337
003	12/22/2021	10			15			12/22/2021		2337
005	12/22/2021	10			15			12/22/2021		2337
008	12/22/2021	10			15			12/22/2021		2337
012	12/22/2021	10			15			12/22/2021		2337
013	12/22/2021	10			15			12/22/2021		2337
011	12/22/2021	25			50			12/22/2021		0
001	12/22/2021	25			50			12/22/2021		2337

Appendix C

OTHER INFORMATION
DEF MUST PARTICIPATE IN LIFETIME ELEC MONITORING WHEN NOT INCARCERATED REGARDING ALL COUNTS; CTS. II SHALL BE SERVED CONSECUTIVE TO CT. 1 AND CT. XI SHALL BE SERVED CONSECUTIVE TO CT. 2 AND ALL OTHER COUNTS SHALL BE SERVED CONCURRENTLY

☐ 9. Sentence(s) to be served consecutively to (if this item is not checked, the sentence is concurrent)
☐ each other.
☐ case numbers _____.

10. The defendant shall pay:

State Minimum	Crime Victim	Restitution	DNA Assess	Court Costs
680.00	130.00	0.00	0.00	300.00

Attorney Fees	Fine	Other Costs	Total
0.00	0.00	0.00	1110.00
		Total	1110.00

The due date for payment is 12/22/2021. 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 concealed weapon board shall
☐ suspend for _____ days
☐ permanently revoke
the concealed weapon license, permit number _____, issued by _____ County.

☐ 12. The defendant is subject to lifetime monitoring under MCL 750.520n.

13. Court recommendation:

DEF MUST PARTICIPATE IN LIFETIME ELEC MONITORING WHEN NOT INCARCERATED REGARDING ALL COUNTS; CTS. II SHALL BE SERVED CONSECTIVE TO CT. 1 AND CT XI SHALL BE SERVED CONSECUTIVE TO CT. 2 AND ALL OTHER COUNTS SHALL BE SERVED CONCURRECNTLY

12/22/2021	/s/	P64585
Date	Judge	Bar no.

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

(SEAL) /s/_____
Deputy court clerk