STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2011
v	No. 298074 Livingston Circuit Court
DANIEL ARTHUR RING, Defendant-Appellant.	LC No. 09-017999-FC

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

PER CURIAM.

Defendant Daniel Arthur Ring appeals as of right his jury conviction of criminal sexual conduct in the first degree.[1] MCL 750.520b(1)(f). The trial court sentenced defendant to serve 35 months to 20 years in prison for his conviction. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant, who was 26, returned to live with his parents after having completed his service with the United States Army. In June 2008, he went to a local restaurant and bar. At the bar, defendant began to interact with JK, who was the mother of a girl that he had known from high school. While talking with defendant, JK recalled that her daughter had expressed an interest in him. JK offered to give her daughter's phone number to him and he called her and spoke with her. At some point, defendant asked JK if she wanted a shot of liquor and she agreed, but left to use the bathroom. When she returned, she saw the shot on the bar and drank it. She testified that she did not feel right after the drink and another witness testified that, although she was not intoxicated, JK seemed "off."

JK left the bar shortly before two in the morning. She testified that she fell as she was leaving and her knees and ankles were bleeding. At this point, defendant asked her if she would like a ride home and she agreed. Defendant drove JK to her home. He pulled into the garage

[1] The jury acquitted defendant of assault with intent to commit sexual conduct involving penetration. See MCL 750.520g(1).

and JK got out and opened the door that led into the house. She said that defendant suddenly appeared behind her. He pushed her down, took her clothes off, and eventually raped her. After she warned him that her children would be home soon, defendant dressed and prepared to leave. JK testified that, as he was leaving, he taunted her: "well I guess this means I can't date your daughter."

Defendant testified that he was drunk on the night in question. He stated that, after he drove JK home, she gave him a tour of her home. He said he made advances and she was receptive. They had sex and then he left. He denied that he pushed her or forced her to have sex. And, although he admitted that he had asked JK to set him up with her daughter at the bar, he denied that he said anything to her about dating her daughter while at JK's home.

The jury rejected defendant's contention that the sexual encounter was consensual and found him guilty of criminal sexual conduct in the first degree.

After sentencing, defendant's trial lawyer subpoenaed JK's disability insurance company and personal psychologist to obtain her medical and psychological records for a restitution hearing and a motion for a new trial.[2] The insurance company refused to provide the records, citing the Health Insurance and Portability Accountability Act of 1996 (HIPAA). See 42 USC 1320d *et seq*. JK's psychologist, however, provided the records. During the restitution hearing, the trial court ordered defendant's lawyer to return the records.

In September 2010, defendant filed a sealed motion for a new trial and a release of the psychological records or, alternatively, for an in camera review of the records under MCR 6.201. The trial court held a hearing on the motion in October 2010. After the hearing, the trial court issued an opinion and order denying defendant's requests. The trial court noted that defendant's motion did not actually request a new trial but, rather, only requested a release of JK's psychological records in preparation for a motion for a new trial. The court stated that defendant's earlier receipt of JK's psychological records had violated HIPAA, the Michigan Public Health Code, and the court rules. Accordingly, the trial court ordered the records to be returned to JK as a sanction under MCR 6.201(J). The trial court also concluded that defendant's right to confrontation was not implicated because the right to confrontation is a trial right, not a pre- or post-trial right. The court also denied defendant's request for an in camera review of the records.

This appeal followed.

[2] JK asked the trial court for $62,000 in restitution.

II. DUE PROCESS AND THE RIGHT TO A DEFENSE

A. STANDARDS OF REVIEW

We shall first address defendant's argument that the trial court violated his constitutional right to due process when it refused to let him use JK's psychological records, or, at the least, to review the records in camera. This Court reviews de novo questions of law such as the proper interpretation of statutes and court rules. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). This Court also reviews de novo constitutional questions. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009). However, this Court reviews a trial court's decision to sanction a party under MCR 6.201(J) for an abuse of discretion. MCR 6.201(J); see also, e.g., *People v Greenfield*, 271 Mich App 442, 453-455; 722 NW2d 254 (2006). A trial court abuses its discretion when it reaches a decision that falls outside the range of reasonable and principled outcomes. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009).

B. ANALYSIS

Criminal defendants do not have a general right to discovery. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). Rather, defendants have the right to discovery provided by court rule. See *People v Phillips*, 468 Mich 583, 588-589; 663 NW2d 463 (2003).

Under MCR 6.201(C)(1), a defendant has no right "to discover information or evidence that is protected from disclosure by constitution, statute, or privilege . . . ." Nevertheless, "[i]f a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records." MCR 6.201(C)(2). "Only after the court has conducted the in camera inspection and is satisfied that the records reveal evidence necessary to the defense is the evidence to be supplied to defense counsel." *Stanaway*, 446 Mich at 679. Our Supreme Court has emphasized that "evidence protected by privilege should be provided to defense counsel only if the court finds that the evidence is essential to the defense." *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998). If a party fails to comply with the court rules governing discovery, the trial court may enter an order that "it deems just under the circumstances" and may issue "appropriate sanctions" for willful violations. MCR 6.201(J).

Similarly, the Legislature has limited a defendant's right to obtain privileged information: "[p]rivileged communications shall not be disclosed in . . . criminal . . . cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section." MCL 330.1750(1). A "privileged communication" is "a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient . . . ." MCL 330.1700(h). The Legislature crafted the psychologist-patient privilege to "preclude defendants from having any access to" privileged communications. *Stanaway*, 446 Mich at 662. Indeed, a psychologist cannot be compelled to disclose confidential information, but may do so with the consent of the patient or with the consent of the patient's guardian if the patient is a minor. MCL 333.18237; see also *People v Lobaito*, 133 Mich App 547, 562; 351 NW2d 233 (1984).

Federal law also protects a person's psychological records. HIPAA governs when a "covered entity" may use or disclose an individual's "protected health information." See 45 CFR 164.502. A "covered entity" includes a health plan, a health care clearinghouse, and health care providers who transmit health information electronically. 45 CFR 160.103; see also 45 CFR 160.102(a). "Health information" includes any information that is created or received by a health care provider and that "relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual." 42 USC 1320d(4). "Under HIPAA, the general rule pertaining to disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510." *Holman v Rasak*, 486 Mich 429, 438-439; 785 NW2d 98 (2010).

In the present case, JK's psychological records fell within the scope of MCR 6.201(C)(1). First, the records were protected from disclosure by privilege; the records covered communications between JK and her psychologist in connection with the psychologist's examination, diagnosis, and treatment. *Stanaway*, 446 Mich at 659-660; MCL 330.1750; MCL 330.1700(h); MCL 333.18237. Second, her records were protected from disclosure under HIPAA; the records were "health information" because they were created by JK's psychologist and related to her mental health. *Holman*, 486 Mich at 438-439; 42 USC 1320d(4); 45 CFR 164.502. Because her records were protected from disclosure by the statutory psychologist-patient privilege and HIPAA, defendant had "no right to discover" the records; the records were moreover "not . . . available for use as evidence." MCR 6.201(C)(1); *Stanaway*, 446 Mich at 662. Defendant could, however, obtain a waiver from JK. MCL 330.1750(1); *Holman*, 486 Mich at 438-439. Defendant could also request that the trial court conduct an in camera inspection of the records. MCR 6.201(C)(2). To do so, defendant would have had to demonstrate a "good faith belief, grounded in articulable fact, that there [was] a reasonable probability that [the] records . . . [were] likely to contain material information necessary to the defense." MCR 6.201(C)(2). But, defendant did not do either. Rather, defense counsel issued a subpoena for the records to JK's psychologist, and the psychologist gave defense counsel the records. Defendant, thus, obtained the records in clear violation of MCR 6.201. MCR 6.201(C)(1)-(2); see also *Stanaway*, 446 Mich at 679.

Given this violation, the trial court had discretion to enter an order that "it deem[ed] just under the circumstances." MCR 6.201(J). Indeed, the trial court had discretion to issue "appropriate sanctions" against defendant's lawyer. *Id.* And the trial court's decision to order the return of the records so that defendant could not rely on them for purposes of the restitution hearing and a motion for a new trial did not fall outside the range of reasonable and principled outcomes. *Roper*, 286 Mich App at 84.

Defendant suggests that JK might have waived the privilege by authorizing her psychologist to speak to the trial court. But he does not provide any additional substantive argument regarding waiver—let alone argument with citation to legal authority. Thus, we conclude that he has abandoned this claim on appeal. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Defendant also argues that he did not violate MCR 6.201 because JK's psychologist willingly disclosed the records. Defendant insists that MCR 6.201(C) is only a mechanism to resolve "challenges where there is a refusal to turn over records on the basis of privilege." According to defendant, MCR 6.201(C) does not limit what discovery a defendant can seek and obtain from a willing party. Defendant, however, misconstrues both MCR 6.201(C) and *Stanaway*. MCR 6.201(C)(1) expressly states that there is no right to discover information that is protected from disclosure by constitution, statute, or privilege. Importantly, the *Stanaway* Court opined that the statutory psychologist-patient privilege evidences the Legislature's intent "to preclude defendants from having *any access to*" privileged counseling communications. *Stanaway*, 446 Mich at 662 (emphasis added). By obtaining the records from JK's psychologist, defendant obtained information protected from disclosure by both privilege and statute; thus, defendant discovered information that he had no right to discover. *Id.*; MCR 6.201(C)(1). To get access to JK's psychological records, defendant had to either obtain a waiver from JK or request an in camera review of the records and meet the requirements of MCR 6.201(C)(2). *Stanaway*, 446 Mich at 662; *Holman*, 486 Mich at 438-439; MCR 6.201(C); MCL 330.1750(1). And, even if defendant obtained an in camera review of the records, defendant could only obtain the records if the trial court determined that the records revealed evidence necessary to the defense. *Stanaway*, 446 Mich at 662. Our Supreme Court has emphasized that "[o]nly after the [trial] court has conducted the in camera inspection and is satisfied that the records reveal evidence necessary to the defense is the evidence to be *supplied* to defense counsel." *Id.* (emphasis added).

Defendant also argues that he had authority to issue a subpoena under MCR 2.506 to obtain JK's records from the psychologist. MCR 2.506 provides that a court may command a party or witness by subpoena to appear, testify and produce records, documents, and other tangible things in open court. MCR 2.506 is not a tool for discovery. See *In re Subpoenas to News Media Petitioners*, 459 Mich 1241; 593 NW2d 558 (1999) ("The district court erred in allowing use of a subpoena under MCR 2.506 as a discovery procedure in a criminal case."). Furthermore, this Court has specifically determined that a defendant may not obtain privileged records with a subpoena. *People v Crear*, 242 Mich App 158, 168; 618 NW2d 91 (2000) (noting that a patient has an absolute privilege against the production of her counseling records and could not be compelled to produce them by subpoena), overruled on other grounds *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008). Obtaining privileged records with a subpoena is inconsistent with the clear dictates of MCR 6.201(C).

Defendant also argues that the trial court should have conducted an in camera review of the records when it ruled that defendant was not entitled to use the records. Defendant asserts that he has demonstrated a reasonable probability that the records contain material information necessary to his defense. Defendant violated MCR 6.201 by obtaining JK's privileged records through a subpoena before requesting an in camera inspection under MCR 6.201(C)(2); therefore, the trial court had discretion under MCR 6.201(J) to remedy the violation with an appropriate sanction. MCR 6.201(J). Defendant could not excuse his violation by fulfilling the requirements—to the extent that he did—after the fact. And the trial court's decision to preclude him from using the records was an appropriate sanction for the violation.

Defendant's final argument is that the trial court's decision to prohibit defendant from relying on the records during the restitution hearing violated his rights to due process and confrontation. Neither this Court nor our Supreme Court has determined whether the Confrontation Clause applies to a restitution hearing. However, the United States Supreme Court has stated that "[t]he right to confrontation is basically a trial right." *Barber v Page*, 390 US 719, 725; 88 S Ct 1318; 20 L Ed 2d 255 (1968). And, this Court has held that the "right to confront adverse witnesses . . . does not apply at sentencing." *People v Uphaus*, 278 Mich App 174, 184; 748 NW2d 899 (2008). Further, the United States Court of Appeals for the Tenth Circuit directly held that a defendant does not have the right to confront witnesses at a restitution hearing. *United States v Sunrhodes*, 831 F2d 1537, 1543 (CA 10, 1987). Other jurisdictions have also reached the same result, emphasizing that a restitution hearing is part of the sentencing process where procedural protections are less stringent than the protections afforded to a presumptively innocent defendant during trial. See *Box v State*, 993 So 2d 135, 139 (Fla App, 2008); *Franco v State*, 918 A2d 1158, 1161 (Del, 2007). We likewise conclude that defendant did not have a constitutional right to confront JK at his restitution hearing. As such, the trial court's decision to deny defendant the use of JK's psychological records necessarily did not deny him the right to confront her at the restitution hearing.

For similar reasons, defendant's due process argument also fails. Under Michigan's Crime Victim's Rights Act, MCL 780.751 *et seq.*, a defendant must "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." MCL 780.766(2); see also *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008). When determining the amount of restitution, the act requires that a court "consider the amount of loss sustained by the victim, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependants, and such other factors as the court deems appropriate." *People v Avignone*, 198 Mich App 419, 422; 499 NW2d 376 (1993); see also MCL 780.767(1). The court may order the probation officer to obtain information regarding the amount of loss and place it in a report. MCL 780.767(2). And, the court must "disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report" addressing the amount of loss sustained by the victim. MCL 780.767(3). If the parties dispute the proper amount of restitution, the court must conduct a hearing, take evidence, and resolve the dispute by a preponderance of the evidence. *Avignone*, 198 Mich App at 424. The act "places the burden of proof regarding financial hardship upon the defendant and the burden of proof regarding damage to the victim and the earning capacity of the defendant upon the prosecutor." *Id.* The act is silent as to whether a defendant may conduct additional discovery for purposes of a restitution hearing; however, our Supreme Court has held that "the Crime Victim's Rights Act provides criminal defendants adequate process." *People v Gahan*, 456 Mich 264, 277; 571 NW2d 503 (1997). Accordingly, the trial court's decision to limit defendant's ability to conduct additional discovery did not amount to a violation of due process; defendant had adequate procedural safeguards under the act.

The trial court did not abuse its discretion or violate defendant's constitutional rights when it limited his ability to use JK's psychological records.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARDS OF REVIEW

We shall next address defendant's argument that his trial counsel was ineffective. Specifically, he argues that his trial counsel should have requested an in camera review of JK's psychological records either before or during trial and should have objected to a nurse's testimony that JK's injuries were consistent with her allegation of sexual assault because that testimony improperly bolstered JK's testimony. Whether defendant did not have the effective assistance of counsel is normally a question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.* However, where—as here—the trial court did not conduct an evidentiary hearing on the issue, this Court's review is limited to mistakes that are apparent in the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. ANALYSIS

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must show that his counsel's performance was so deficient "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US at 687. To do so, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Id.* at 688-689. Courts strongly presume that counsel rendered adequate assistance. *Id.* at 690. In addition, defendant must show that his counsel's deficient performance prejudiced his defense by showing that there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Defendant further "bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

Defendant argues that counsel was ineffective for failing to request an in camera hearing to review JK's psychological records either before or during trial. Even assuming that counsel was ineffective for not requesting an in camera inspection, defendant cannot establish a reasonable probability that, but for counsel's alleged unprofessional error, he would have been acquitted of first-degree criminal sexual conduct. *Strickland*, 466 US at 694. Indeed, defendant does not provide this Court with any argument at all regarding prejudice. It is difficult to image how the records could rebut the evidence that he forced JK to have sex and injured her in the process. And, defendant has not established a reasonable probability that the records, which allegedly detail JK's preexisting psychological injury, would have led the trial court to conclude that she was not due over $62,000 in restitution that resulted from her need for mental treatment after the rape. The prosecutor was not required to prove that defendant was the sole cause of JK's mental anguish. *People v Brown*, 197 Mich App 448, 452; 495 NW2d 812 (1992). Defendant is responsible for the harms he inflicted without regard to the state that JK was in prior to his criminal acts; therefore, any special susceptibility that she had to the psychological injury is not a ground for relieving him from the obligation to pay restitution. *Id.*

We also do not agree that defendant's counsel was ineffective for failing to object to the nurse's testimony that JK's injuries were consistent with sexual assault. Defendant asserts that the nurse could not properly vouch for JK's credibility and could not testify that JK was actually sexually assaulted. Defendant insists that the logical inference from the nurse's testimony was that JK told the truth. It is improper for a witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). And, it is also improper for a witness to express an opinion on a defendant's guilt or innocence. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

At trial, the prosecutor questioned the nurse about JK's treatment:

Q. And what form of treatment did you provide to [JK]?

A. Her—because her physical findings were consistent with her history of sexual assault, I gave a prophylactic antibiotics [sic].

* * *

Q. And as a result of your evaluation, you did indicate that your physical findings or your examination of [JK] was consistent with what she said, is that correct?

A. Yes.

Q. Now, to be fair, is there anyway during the course of an examination of the patient for sexual assault that you can actually say, oh, when I see this they've been sexually assaulted versus not?

A. No.

* * *

Q. Just—just confirming, doing this genital examination of a patient, can you say with any degree of certainty whether they've been sexually assaulted or not?

A. No.

Q. Is that in any way possible?

A. No, it isn't.

Q. But as a sexual assault nurse examiner you look at the history, look at what you've seen physically, and make that determination that it appears consistent with?

A. Correct.

Contrary to defendant's assertions, the nurse did not comment on JK's credibility. *Buckey*, 424 Mich at 17. And, the nurse did not express an opinion on defendant's guilt or innocence. *Bragdon*, 142 Mich App at 199. Rather, she properly expressed an opinion regarding the source of JK's injuries that was rationally based on her perceptions and helpful to a determination of a fact in issue.[3] MRE 701. Therefore, counsel was not ineffective for failing to make a futile objection or argue a meritless position. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant has not shown that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms that prejudiced his trial.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARDS OF REVIEW

Finally, defendant argues that the prosecutor engaged in misconduct that denied him a fair trial. Specifically, he argues that the prosecutor engaged in misconduct by stating her personal belief that defendant lied, by noting that the nurse had testified that JK's injuries were consistent with sexual assault, by arguing that the jury should consider why defendant did not call certain witnesses to testify, and by suggesting that defendant's lawyer was attempting to mislead the jury. Defendant further argues that his trial counsel was ineffective for failing to object to these instances of misconduct. This Court reviews preserved claims of prosecutorial misconduct de novo to determine whether the misconduct deprived the defendant of a fair trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, to the extent that the claims of error were unpreserved, this Court reviews them for plain error affecting the defendant's substantial rights. *Id.* at 451.

B. ANALYSIS

Defendant's first argument is that the prosecution denigrated his trial counsel during closing and rebuttal arguments by suggesting that counsel was attempting to mislead the jury. Defendant specifically takes issue with the following closing arguments:

> So, in a minute Mr. Brewer's going to get up. He's gonna make statements. And when you listen to everything he has to tell you, look at them through the eyes of your common sense, your general [everyday] knowledge. And think about whether some of the things he's sayin' to you are really gonna make sense. Does it really make sense that [JK], who was trying to hook her daughter up with this young man, who had fallen, scraped her knees, was in pain, and bloody, was crying on the way home, but even by the words by the Defendant, and complaining of pain, within this short period of time, is then making out with him. Think about that. Apply your common sense when you

[3] The trial court did not qualify the nurse as an expert.

> listen to the version of events. Because common sense is defied, reality is defied, by believing that set of events.

Defendant also challenges the prosecutor's rebuttal:

> Now, [defense counsel] talks about all these—what he considers to be inconsistencies in [JK's] testimony. And you know what, there are some things that are different. There were some things that are a little bit inconsistent. . . . So, in terms of some of the inconsistencies about things that were surrounding this night, you know what, there were inconsistencies. . . . [Defense counsel] tested her credibility about all kinds of things surrounding the event, but did he ever really testify—or did he really ever elicit big inconsistencies about the assault itself[?] Did he ever elicit from her how things were different[?] Did he bring up inconsistencies and how she talked about being pushed onto the floor, be—or being pushed onto the couch, the glass breaking, the—him assaulting her in the one room, her going into the bathroom, him forcing his way into the bathroom, him trying to put his penis into her buttocks, and then him going back and having sex with her again[?] Did he point out any inconsistencies in the meat of it or were they all around it[?] Trying to have shiny objects on the edge that you'll focus your attention to instead of where it needs to be on what happened. Think about that when you go back there. I'll leave it to you. You guys are smart. You'll know what to do with that testimony.

A prosecutor has great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). Nevertheless, a prosecutor cannot personally attack defense counsel. *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010). And, a prosecutor cannot suggest that defense counsel is intentionally attempting to mislead the jury. *Fyda*, 288 Mich at 461. When a prosecutor does so, the prosecutor "is in effect stating that defense counsel does not believe his own client." *Id.*

In the present case, however, the prosecutor's arguments were proper. The prosecutor did not personally attack defense counsel. *Likine*, 288 Mich App at 659. The prosecutor's argument that the jurors should use their "common sense" when considering defense counsel's arguments was not inappropriate. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992) (stating that the prosecutor's repeated references to the jury's common sense were neither disparaging nor prosecutorial misconduct). The prosecutor was simply arguing the evidence when she asserted that defendant's version of the sexual encounter defied common sense; the prosecutor was not required to confine her argument to the blandest possible terms. See *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Furthermore, although the prosecutor argued that defense counsel was attempting to focus the jury's attention on minor inconsistencies in JK's testimony, the prosecutor did not suggest that defense counsel did not believe defendant. See *Fyda*, 288 Mich App at 462. During rebuttal argument, a prosecutor may suggest that defense counsel attempted to distract the jury during closing argument. *Id.*; see also *People v Watson*, 245 Mich App 572, 593-594; 629 NW2d 411 (2001) (stating that the prosecutor properly suggested during rebuttal argument that defense counsel attempted to distract the jury by focusing on discrepancies in testimony instead of the truth of the big picture).

Next, defendant argues that the prosecutor denied him a fair trial by improperly stating her personal belief that defendant lied. A prosecutor may argue the evidence and all reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Indeed, "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). However, prosecutors may not express their personal opinion of a defendant's guilt. *Bahoda*, 448 Mich at 282-283. And, prosecutors may not suggest that they have special knowledge of the veracity of witnesses. *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004).

In closing, the prosecutor argued that JK's version of events was credible and that defendant's version was not worthy of belief:

> The Judge is going to tell you that it is your job to consider credibility. It is your job to decide which witnesses to believe. . . . Do you really think that [JK] would go through all of this just when she, if we want to believe the Defendant, some romp after bein' at the bar. Do you think she's really gonna go through all this. A couple of days and then going to a sexual assault nurse examiner, having an evasive examination with a speculum by this nurse that she doesn't know, attempting suicide the day after that occurs, being placed in the stress unit at Owosso Memorial Hospital for eight days, and then waiting the two years to be here, if that's not what happened. What is her motivation to say anything other than that's what happened.
>
> * * *
>
> Now, we know Dan Ring doesn't hesitate to lie because he lied to Trooper Corriveau. You saw it on that video tape. Trooper Corriveau gave him all fair warning and said, listen, you need to be straight with me. . . . And when asked did anything happen the Defendant said no. And it was only when confronted with the possibility that there could be physical evidence, well, oh, I guess that was a lie so let me tell this version of events. He doesn't hesitate to lie. He doesn't hesitate to lie to the trooper. And I guarantee as he got on this witness stand he wouldn't hesitate to put on a nice show and lie to you. But look at everything he had to say. Compare his testimony as it was from an interview very close in time versus the performance that we received in the courtroom and decide.
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> * * *
>
> Consider credibility. Do people who are afraid that they're going to be in trouble for something lie on occasion, yes. Is [JK] gonna be in trouble for anything, absolutely not; no motivation. Dan Ring does he have motivation, absolutely. Does the witness have any bias, prejudice, or personal interest in how this case is decided, Dan Ring does. Does the witness have any special reason to tell the truth or any special reason to lie. I'm sure Dan Ring would let down a lot of people if they knew that he took advantage of this woman who was incapacitated, bleeding, and he had sex with her because he was horny. So, does

> he have reason to try to not let those people down, absolutely. But does that mean you should believe what he has to say, absolutely not.

The prosecutor's arguments were not inappropriate. The prosecutor properly argued on the basis of the facts that the jury should believe JK. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). The prosecutor properly argued that defendant was not worthy of belief on the basis of the evidence, specifically, defendant's inconsistent statements to a police officer. See *Bahoda*, 448 Mich at 281-282. The prosecutor neither expressed a personal opinion of defendant's guilt nor suggested that she had special knowledge of either JK's or defendant's credibility. *Id.* at 282-283. The prosecutor also did not imply that she had special knowledge of JK's or defendant's credibility by addressing whether either JK or defendant had a motive to lie. See *Thomas*, 260 Mich App at 455 ("In fact, the prosecutor made no comments at all about his personal knowledge or belief regarding the truthfulness of the police witnesses; he merely argued that the officers had no reason to lie."). Thus, these arguments were not improper.

Defendant also argues that the prosecutor improperly emphasized the nurse's testimony that JK's injuries were consistent with her allegation of sexual assault. As already noted above, the nurse's testimony was properly admitted. And, therefore, the prosecutor could properly refer to that evidence in arguments. See *People v Pauli*, 138 Mich App 530, 542; 361 NW2d 359 (1984).

Finally, defendant argues that the prosecutor improperly shifted the burden of proof onto defendant by arguing during rebuttal that the jury should consider why defendant did not call certain witnesses to testify. Defendant specifically takes issue with the following statements:

> The first thing is that, yes, it is my burden of proof. . . . But there's one thing that you have to consider, is that once the Defendant chooses to present evidence, then you must also consider that evidence and its credibility. . . . You have to consider if he decides to present witnesses people [sic] that he didn't call. You know, he wants to stand here and say, well, you know, it's not—not that unusual to think that . . . she might have found him attractive and somehow . . . wanted to engage in the sexual conduct because he was attractive . . . . And . . . again, something that he didn't tell to Trooper Corriveau, but he did say on the witness stand is well she came up when I was talkin' to Sarah and she was like feelin' my arm, feelin' my muscles. . . . If that really happened, where's Sarah[?] He brings all these bartenders to try to trash out [JK]. . . . But where's Sarah[?] . . . That witness isn't here 'cause that didn't happen. You know, where's this other guy Dennis[?] You know, first he tells me, oh, all these friends from high school and then it's like I only know one person's name. Is that credible[?] So, you know what, yes, I have the burden of proof, but you can consider once he's presented evidence whether it's credible. And you can consider what's missing from what he presented.

When read in context, these remarks were not an improper attempt to shift the burden of proof. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Because defendant presented an alternative theory to the case, the prosecutor could point out the weakness in defendant's case by commenting on defendant's failure to produce corroborating witnesses for his theory. *People v Fields*, 450 Mich 94, 111-112; 538 NW2d 356 (1995). Moreover, the trial court properly instructed the jury after closing arguments that the prosecution had the burden of proving each element of the crimes charged beyond a reasonable doubt and that defendant was not required to prove his innocence or do anything. And a jury is presumed to follow a trial court's instructions. *Fyda*, 288 Mich App at 465.

The prosecutor did not engage in misconduct. And defendant's trial counsel, accordingly, cannot be faulted for failing to object to unobjectionable comments. *Thomas*, 260 Mich App at 457.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello