

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 15, 2011

v

JEFFREY JOSEPH BARBIERI,

Defendant-Appellant,

No. 298251
Macomb Circuit Court
LC No. 2009-003276-FH

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of criminal sexual conduct, third degree (CSC III), MCL 750.520d(1)(e)(i) (student victim). Defendant was sentenced to 45 to 180 months' imprisonment on each count, to be served concurrently. Because defendant was not denied the effective assistance of counsel, or his right to due process or a fair trial and because the prosecution did not engage in misconduct, we affirm.

Defendant taught social studies at the high school where the complainant was a student. The complainant testified that what started out as "regular student/teacher relationship" began to change toward the end of her junior year, when she and defendant began to engage in flirtatious behavior. The relationship progressed to a sexual relationship during the complainant's senior year, when the two started talking on the phone and spending time alone together, several times going to a Holiday Inn.

On appeal, defendant asserts he was denied the effective assistance of counsel, for two reasons. First, defendant argues that his trial counsel committed a serious error when he spoke of an allegation of inappropriate contact between defendant and another student in his opening statement. We disagree.

The constitutional right to counsel includes the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Michigan has adopted the two-part standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 315-318; 521 NW2d 797 (1994). First, the defendant must show that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 US at 688. Second, the defendant must show 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. Proof of both prongs is needed to show that a conviction “‘resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable.’” *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), quoting *Strickland*, 466 US at 687.

Prior to trial, the prosecution filed a notice of intent to introduce evidence under MRE 404(b) that defendant had been involved in a prior situation with another female student wherein he began “grooming” her with inappropriate verbal and physical contact. Defense counsel objected to the use of this evidence, but later withdrew his objection during a pretrial hearing. In his opening statement, defense counsel referenced this previous situation in the context of explaining why, despite his exoneration in the prior matter, the complainant might have wanted to now falsely accuse defendant. Moreover, during his cross-examination of the complainant, defense counsel asked her to name the other student who had complained about defendant’s flirtatiousness. The other student never testified.

Using the complainant’s testimony, counsel characterized defendant’s behavior as merely flirtatious, harmless, and perhaps taken out of context by one female student. Viewed in this light, counsel’s stance on the evidence was consistent throughout trial, in that he sought to use the evidence to defendant’s advantage, as long as he could control it and characterize it in a way that suited his theory of the defense. While defendant may not agree in hindsight that trial counsel’s use of the other acts evidence was sound trial strategy, defendant has not overcome the presumption that it was not. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Further, given the evidence introduced, defendant has not shown that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 694.

Defendant also argues that trial counsel was ineffective for failing to question the complainant about prior inconsistent statements during cross-examination, and then improperly attempting to do so when the investigating officer was on the witness stand. One alleged inconsistency was that the complainant could not identify defendant’s vehicles during her police interview, but did so at trial. However, defense counsel did bring out this discrepancy during his cross-examination of the officer. The testimony was never stricken.

Defendant also contends that defense counsel was ineffective for failing to confront the complainant with prior inconsistent statements about the number of times she went to the hotel with defendant and how many times they had sexual intercourse. According to defendant, the complainant reported during her police interview that she had only had sex with defendant once, and cites the police report appended to his brief on appeal. The complainant testified at trial that she had sex with defendant on two separate occasions, and testified at her preliminary examination that she thought they had had sex twice. The report reads: “On the first three encounters at the hotel, [the complainant] states she and [defendant] kissed and had physical contact over the clothing. . . . On the fourth encounter at the Holiday Inn, [the complainant] states she had sexual intercourse with [defendant] twice.” This does seem inconsistent with the complainant’s trial testimony, although in both instances two occasions of sexual intercourse are noted. However, the officer testified that the complainant told him during the interview that she had sex with defendant on two of the four times that they visited the hotel. Given the officer’s testimony, it was not objectively unreasonable to fail to pursue this matter with the complainant.

As for the number of times she and defendant went to the hotel, the complainant agreed with the prosecutor at the preliminary examination that she was at the hotel three or four times. It was clear that she was unsure about the exact number, and this is seemingly inconsistent with her trial testimony that she went to the hotel with defendant four times. Despite the complainant's testimony, counsel could have reasonably concluded that given the equivocal nature of her preliminary examination testimony, pressing the point at trial would have done little to undermine her credibility.

Defendant also asserts that counsel should have challenged the complainant on her trial testimony that defendant touched her under her clothing during the first two hotels visits, that she told people other than the one boy she identified about her relationship with defendant, that she got defendant's phone number at the end of her junior year, and about the location of the Holiday Inn. Defendant argues that the first and fourth matters are contradicted by her police interview, and that the second and third contradict her preliminary examination testimony. The police report does say that the complaint did not know the location of the Holiday Inn, while she was able to identify the location at trial. Counsel could have reasonably determined, however, there would be little to gain by pushing her on this point, as she could have simply replied that she now recalled the location or that she had become informed of it after the interview. Similarly, she could have also testified that she did not recall at the preliminary examination when she got defendant's phone number, but had recalled it since then.

Inconsistencies on whether defendant touched the complainant over or under her clothing and who she told about the relationship would tend to go more directly to undermining her credibility. Counsel could have reasonably determined that challenging the complainant's credibility in other ways would be more productive. And counsel did dispute her credibility at length. That other avenues to undermine her credibility existed does not mean that counsel was ineffective for not choosing to explore them.

Next, defendant alleges several instances of prosecutorial misconduct. Claims of prosecutorial misconduct are reviewed de novo to "determine whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450–451; 709 NW2d 152 (2005). We review issues of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

Defendant first contends that the prosecutor impermissibly shifted the burden of proof onto him when she questioned him about his involvement in the gambling ring on cross-examination. Defendant also takes issue with the prosecutor's rebuttal argument in which she again mentioned that defendant had failed to inform the police that he had been involved in a gambling ring, or that he felt threatened by the members of the ring, as he had claimed in his testimony.

Defendant testified that he was involved in a gambling ring with several others (including the complainant), whose last names he did not reveal and whom he did not want to present to testify. On cross-examination, the prosecutor asked defendant whether he told the police the names of the individuals who were involved in the gambling ring, to which defendant replied, "Absolutely not." Defendant argued that this exchange with the prosecutor improperly implied that he "had the obligation to prove something."

Rather than shifting the burden of proof onto defendant, the prosecutor was properly challenging the credibility of defendant's story. In questioning defendant's testimony, the prosecutor was not requiring defendant to prove his innocence; rather, she was "assail[ing] [his testimony] like that of any other witness." *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). Noting on this lack of supporting evidence during closing argument is also proper comment. *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010) ("Attacking the credibility of the theory advanced by [the defendant] did not shift the burden of proof.").

Defendant further argues that the prosecutor committed misconduct by attempting to elicit opinion testimony as to the complainant's credibility. On direct examination, the prosecutor asked the complainant to describe "how you feel about the Defendant now, thinking back on the relationship, how do you feel?" The complainant responded that now that she "realize[d] what really happened" she felt "like I was just used." Defense counsel objected based on relevance, and based on his understanding that the question asked the complainant to characterize the nature of her testimony. The court sustained the objection and asked the jury to disregard the complainant's statement, stating that "whether or not she's telling the truth today . . . that's for the jury to—to make that determination." A subsequent objection on this same matter was also sustained.

There is no indication in the record that defendant was prejudiced by the brief exchange. The court contemporaneously informed the jurors that the complainant's truthfulness was a matter to be decided by them. Further, the court instructed the jury after the close of proofs that it should not consider evidence that was excluded or stricken. Our Supreme Court has stated that a jury is presumed to "follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant." *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001) (citations and internal quotation marks omitted). Because defendant has not shown "an overwhelming probability" that the jury was unable to follow the court's instruction not to consider the complainant's response, nor has he shown that the complainant's statement was "devastating" to his right to a fair trial, he is not entitled to a new trial based on this issue.

Defendant also argues that the prosecutor attempted to elicit testimony from the investigating officer that the complainant's trial testimony was truthful. The prosecutor asked the officer to comment upon whether he felt the complainant was being truthful during her initial police interview based on her demeanor at the time. Taken in context, it is clear that the prosecutor's purpose was to explain the officer's actions during the interview and the circumstances under which the complainant told him about her relationship with defendant, not to present to the jury the officer's personal belief regarding the complainant's credibility. Thus, there was no misconduct.

Finally, defendant argues that the trial court prejudiced him when it told the jury that it could not ask defendant certain questions they had presented based on the attorney-client privilege. Pursuant to a pilot program, the jurors were informed at the start of trial that they would be allowed to pose questions. The jury submitted several questions for defendant following his testimony, most of which the trial court addressed to defendant for response. Though, the trial court did not ask defendant to respond to questions concerning why he had not

presented certain individuals as witnesses. The trial court stated that these questions “implicate the attorney-client privilege and so . . . I will not be able to ask those of the witness.”

Defendant’s argument that informing the jury that certain questions could be asked because they implicated the attorney-client privilege somehow shifted the burden of proof is somewhat obscure. He does assert that the trial court’s response “gave tacit approval to the prosecution’s argument”, i.e., the prosecution’s alleged burden shifting with regard to the same witnesses. But as already concluded, the prosecutor did not improperly shift the burden of proof, therefore there was no improper behavior to tacitly sanction.¹

In any event, the trial court clearly instructed the jury on the burden of proof, and defendant offers no objection to the instructions as given. The trial court instructed the jury that defendant “is not required to prove his innocence or to do anything.” It is axiomatic that jurors are presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

¹ Defendant also argues that the jury’s question showed that the jurors did not understand the burden of proof, in light of the fact that they had an instruction on the burden of proof in a folder in front of them (also as part of the pilot project). Even if this is so, the trial court cannot be faulted, which is the focus of defendant’s allegation of error requiring reversal.