

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

DANIEL ALBERT LOEW,

Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION

January 13, 2022

9:15 a.m.

No. 352056

Allegan Circuit Court

LC No. 18-021709-FC

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

MURRAY, C.J.

Following a jury trial, defendant was found guilty of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f) (defendant causes personal injury to the victim and uses force or coercion), one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(f) (personal injury to victim and force or coercion), one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (sexual penetration involving victim at least 13 years of age and under 16 years of age), and one count of CSC-III, MCL 750.520d(1)(b) (penetration by force or coercion). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 240 to 480 months’ imprisonment for the CSC-I convictions and to 240 to 360 months’ imprisonment for the CSC-II and CSC-III convictions. Defendant appealed his convictions and sentences to this Court. He also moved for a new trial in the trial court on the basis of judicial misconduct, ineffective assistance of counsel, and prosecutorial misconduct. The prosecution filed a cross-appeal after the trial court granted defendant a new trial on the basis of judicial misconduct. For the reasons set forth in this opinion, we reverse the trial court’s order granting defendant a new trial.

I. BASIC FACTS

The relevant events began in December 2015, when the victim was 13 years old. At the time, defendant and the victim’s cousin, Brouke Loew, were dating. Defendant, Brouke, and their infant son lived with Brouke’s parents, Jane and Scott Heppe, at the Heppes’ rural Allegan County home. Near the end of December 2015, Brouke’s parents hosted a wedding reception for the

victim's father and his new wife. The reception was held in a detached garage, and wedding guests did not have access to the Heppes' house.

Sometime during the evening, Brouke asked the victim to go to the house to help defendant unload groceries. The victim was in the kitchen when defendant called the victim to the bathroom so he could "show [her] something." The victim went to the bathroom where defendant closed and locked the door. According to the victim, defendant undressed her and forced her to engage in penile-vaginal sex on the bathroom floor. Defendant ejaculated on the floor before exiting the bathroom. The victim remained in the bathroom where she felt cramping in her stomach and had vaginal bleeding.

After the victim's father became incarcerated in early 2016, Jane volunteered to take the victim and her sisters to see their father on the weekends. The victim and her sisters would usually stay Friday evenings at the Heppes' house and would get up early Saturday mornings to travel to the prison for the visits. On those weekends, the victim and her younger sister would sleep on the living room couches. After everyone was asleep, the victim would wake up to defendant "touching me, my thighs, my boobs, my butt, everywhere, all over my body." Defendant would walk the victim to the bathroom where he would make her engage in penile-vaginal sex. The victim described that defendant would ejaculate on the floor or on the bathroom rugs. During one encounter, the victim stated defendant grabbed her by the hair and "pushed [her] head to the ground with his hand." As a result, the victim's eyes became swollen and irritated.

These incidents mostly occurred in the bathroom at the Heppes' house; however, the victim also recounted one episode of penile-vaginal sex at the home she once shared with her father and another incident where defendant forced the victim to perform fellatio in his pickup truck. After completing the fellatio, the victim asked defendant when he would stop forcing himself on her, to which defendant replied: "If you tell anyone, you don't want to know what happens." Nevertheless, the victim disclosed the abuse to her father during a prison visit in January 2018. The victim's older sister learned of the disclosure and reported it to the Michigan State Police (MSP).

After the MSP investigated the circumstances of the crimes, defendant was subsequently charged, convicted and sentenced as noted. This appeal followed. Before this Court could consider defendant's appeal, however, defendant learned of e-mails between the trial judge and the Allegan County elected prosecutor, who was not the trial prosecutor. The dates and times of the e-mail exchanges indicated the e-mails were sent and received while defendant's trial was ongoing. Consequently, defendant moved the trial court for a new trial alleging judicial misconduct arising from the e-mail exchanges. Defendant alternatively argued a new trial was warranted because defense counsel was ineffective and because the prosecutor committed misconduct by eliciting perjured testimony. The trial court¹ granted defendant a new trial on the basis that the e-mail communications created the appearance of impropriety, but denied the motion

¹ On defendant's motion, the case was reassigned to a different trial court judge. For purposes of this opinion, we will refer to the judge who presided over the trial as the "trial judge" and the judge who decided the motion for new trial as the "trial court."

on the basis of ineffective assistance of counsel and prosecutorial misconduct.² The prosecution filed a cross-appeal to this Court contesting the trial court's grant of a new trial. We now turn to a review of that challenge.

II. ANALYSIS

A. JUDICIAL MISCONDUCT

The prosecution contends the trial court abused its discretion in granting defendant a new trial because the e-mails between the trial judge and the elected prosecutor did not violate the Code of Judicial Conduct, Canons 2 and 3(A)(4), did not cause defendant any prejudice, and therefore did not violate his right to due process of law.

Under MCR 6.431(B), a trial court “may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” We review a trial court's decision to grant a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Our review “examine[s] the reasons given by the trial court for granting a new trial. This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief.” *Id.* (citations omitted). “The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo.” *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015).

Before addressing the legal merits of this argument, we set out below the factual underpinnings for the argument. As noted, this issue arises from e-mail exchanges between the trial judge and the elected prosecutor (who, again, was not handling the trial), which took place during two of the three days of defendant's trial. Before the first e-mail exchange took place, the assistant prosecutor made her opening statement, and put the jury on notice that the investigation by the MSP trooper was somewhat flawed:

And we will hear, unfortunately, that there is no D.N.A. evidence. [The victim] will testify that she made her aunt aware, she made law enforcement aware of blue bath mats that she last remembered the Defendant ejaculating on. And you will hear from Trooper Desch that aunt met him in the middle of the night at a gas station with a garbage bag full- of bath mats that were green, white, and blue. Those bath mats were never taken and shown to the victim. Those bath mats were not seized personally by law enforcement. But Aunt Jane turned those over and those obviously didn't have any DNA on them.

Then, during the direct exam of the MSP trooper, which commenced at 3:11 p.m., the trial prosecutor questioned the trooper about the investigation, and how he did not ideally handle the

² This was defendant's second motion for a new trial. Defendant's first motion was denied by the trial judge.

collection of the mats, and what he would have done differently had the investigation gone correctly. The trooper's trial testimony, after cross-examination, concluded just prior to 3:47 p.m.

The first e-mail from the trial judge to the elected prosecutor occurred at 3:41, and stated:

This [MSP] trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?

The elected prosecutor did not immediately respond, as her responding e-mail was sent at 8:47 a.m. the next day, and stated:

They do but not typically for CSC's [sic]. This trooper has been given additional personal training since this investigation.^[3]

At 8:50 a.m. that same day, the trial judge responded with another question on a different subject:

One more question . . . this victim was not referred for a medical, do you know why?

Twelve minutes later the elected prosecutor responded, and the following exchange occurred:

Yes, because the prior [assistant prosecuting attorney] to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's [sic] in files.

Trial Judge: I thought Safe Harbor would catch it.

[*Elected Prosecutor*]: Unfortunately, no. The forensic interviewer is supposed to check that before case review but the list often is given to interns. I noticed it after the fact at case review but by then not clear on if the victim had much support.

According to defendant and the trial court, defendant's due process right to a fair trial was violated because the trial judge's e-mail questions to the elected prosecutor were ex parte communications that exhibited at least the appearance of impropriety, contrary to the Code of Judicial Conduct, and caused him prejudice.

The Fourteenth Amendment to the United States Constitution provides that states may not "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am

³ The judge's questions apparently arose from a concern regarding the investigation by MSP Trooper Eric Desch. Trooper Desch reported he collected the bathroom rugs where the sexual assaults occurred during a 1 a.m. meeting with Jane at a gas station. The trooper admitted during questioning that he never confirmed with the victim that these were the rugs from the subject bathroom. Trooper Desch also stated he never took pictures of the subject bathroom until several months after the victim first disclosed the abuse, nor did he attempt to interview defendant or Brouke.

XIV; see also Const 1963, art 1, § 17 (“No person shall . . . be deprived of life, liberty or property, without due process of law.”). A person is entitled to due process of law prior to being deprived of one’s liberty, which “in a criminal trial [includes]. . . a neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). “ ‘Due process requires that an unbiased and impartial decision-maker hear and decide a case.’ ” *TT v KL*, 334 Mich App 413, 431; 965 NW2d 101 (2020) (quotation marks and citation omitted). Consequently, a judge should act neither as an advocate nor an adversary in any criminal proceeding, as the hallmark of the judiciary is impartiality. See e.g., *Stevens*, 498 Mich at 178 (quotation marks and citation omitted) (“The right to an impartial judge is so fundamental that without this basic protection, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.”). A judge is presumed unbiased, and “[a] defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality.” *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011).

We first turn to the two canons raised by the parties, Code of Judicial Conduct Canons 2 and 3(A)(4), and consider whether the communications violated either canon. Because a violation of the judicial canons alone cannot constitute a constitutional violation, if we conclude a violation of either canon occurred, we will then turn to whether defendant was prejudiced by those communications. See *People v Aceval*, 282 Mich App 379, 390; 764 NW2d 285 (2009), and *Estate of Trentadue ex rel Aguilar v United States*, 397 F3d 840, 865 (CA 10, 2005) (citing *Simer v Rios*, 661 F2d 655, 679 (CA 7, 1981)) (“not all ex parte proceedings violate due process or even raise a serious constitutional issue”), and *Alexander Shokai, Inc v Comm’r*, 34 F3d 1480, 1484-85 (CA 9, 1994) (no due process violation where ex parte communications did not unfairly prejudice party).

1. EX PARTE COMMUNICATIONS

Ex parte communications by judges are specifically addressed by the Code of Judicial Conduct, which states:

(4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:

(i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.^[4] [Code of Judicial Conduct, Canon 3(A)(4) (footnote added).]

Here, it is undisputed that the trial judge initiated ex parte communications with the elected prosecutor during defendant's trial. We conclude that the e-mail questions from the judge to the elected prosecutor were clearly ex parte because they did not include defense counsel (nor, for that matter, the trial prosecutor). However, under Canon 3(A)(4)(a), ex parte communications that relate to administrative matters are not prohibited. Here, we hold that the e-mails relate to administrative matters because neither related to nor bore on substantive matters in defendant's trial. Rather, they involved matters of administrative process that did not concern defendant's trial. This is clear from the context of the e-mails, as the judge sought clarification of the MSP's *process* for investigating allegations of sexual assault—specifically, whether the MSP continued to utilize detectives for this type of investigation. The prosecutor's response the following day reveals that she too considered the inquiry to be process orientated, as she explained that the MSP did not use detectives on these types of cases, and the trooper had received follow-up training. The same holds true for the second inquiry regarding the *process* of referring victims of sexual assault for medical examinations. Again, the prosecutor's response explained both why no referral occurred for this victim, and the process put in place to ensure no missed referrals occur in the future. These communications did not relate to or bear on any substantive issue in defendant's proceeding, but instead related to larger issues of process. Admittedly, the concerns were tangential to defendant's trial because the general concerns arose during the MSP trooper's testimony, yet the nature of the questions focused more globally on investigatory processes and not on issues specific to the trial itself. Therefore, the communications were not prohibited ex parte communications violative of Canon 3(A)(4).

This conclusion is consistent with decisions from our sister states that have concluded ex parte communications between a sitting judge and a prosecutor do not warrant a new trial so long as the communications focus on administrative or procedural (i.e., non-substantive) matters. For example, the North Carolina Supreme Court rejected a defendant's argument that he was entitled to a new trial, in part, because the trial court judge impermissibly communicated with the prosecutor regarding the oath taken by jurors. *State v McNeill*, 349 NC 634, 642, 653; 509 SE2d 415 (1998). The court determined the defendant was not entitled to a new trial on this basis because the communication "relate[d] only to the administrative functioning of the judicial system." *Id.* at 653. See also *Rodriguez v State*, 919 So 2d 1252, 1275 (Fla, 2005) (The Court held that ex parte communications regarding the subject of the defendant's upcoming hearing did not violate the defendant's due process rights because the communications were purely administrative in nature).

We recognize the danger that ex parte communications can have on a pending case, and/or on the integrity of the judiciary:

⁴ Likewise, the Michigan Rules of Professional Conduct restrict a lawyer's ability to communicate with others, stating: "A lawyer shall not . . . (b) communicate ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order." MRPC 3.5.

Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge ‘may be incomplete or inaccurate, the problem can be incorrectly stated.’ At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption. [*Grievance Adm’r v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000) (quoting Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* (3d ed), § 501, pp 159–160).]

None of these concerns are present here. The communications did not relate to a substantive matter that was to be resolved in defendant’s trial, as the communications related exclusively to how investigations are conducted and when and how victims are referred for medical treatment. We likewise reject the notion that the communications can be read as an attempt by the trial judge to “tip-off” the prosecutor about deficiencies in the case, as the e-mails reflect three direct questions about processes, with the answers revealing that the prosecutor perceived the questions as solely relating to processes.⁵ That these e-mails do not fit squarely into scheduling or other such administrative matters does not take these e-mails out of that category, as they did not relate to substantive matters in defendant’s trial.

Even though the ex parte communications were not related to the merits of defendant’s case, the trial judge was still required to comply with subsections (a)(i) and (ii) of Canon 3(A)(4). The record supports the inference that the trial judge did not consider the e-mails to be advantageous to either party, but the record also supports the conclusion that the trial court did not disclose the e-mails to the parties, as required by subsection (a)(ii). Thus, the trial judge did not comply with the disclosure requirements of Canon 3(A)(4)(a)(ii).

2. THE APPEARANCE OF IMPROPRIETY

This leaves us with the question of whether, as the trial court found, the trial judge’s communications created the appearance of impropriety. The Code of Judicial Conduct, Canon 2, provides that “[a] judge must avoid all impropriety and appearance of impropriety.” There can be no doubt that “there may be situations in which the appearance of impropriety on the part of a judge . . . is so strong as to rise to the level of a due process violation,” *Cain v Dep’t of Corrections*, 451 Mich 470, 512-513 n 48; 548 NW2d 210 (1996), and that a showing of actual bias is not necessary where “ ‘experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’ ” *Crampton v Dep’t of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 SCt 1456;

⁵ Had the trial judge asked these questions to the prosecutor in the hallway at the end of the first day of trial, rather than asking them in an e-mail from the bench, there would be little to discuss. After all, there is no prohibition in a judge asking questions to the elected prosecutor about processes used in criminal investigations, and the most common arena for questions like this to arise are from what occurs during trials.

43 L Ed2d 712 (1975). We hold that even if there was an appearance of impropriety in the e-mail exchange from the bench, defendant has not established prejudice.

We first question whether Canon 2 can even be considered, as the Supreme Court has repeatedly held that the “appearance of impropriety” standard does not govern when specific court rules or canons pertain to a subject. *In re Haley*, 476 Mich 180, 194-95; 720 NW2d 246 (2006) (“We decline to allow general allegations of impropriety that might overlap specifically authorized or prohibited behavior and conduct to supersede canons that specifically apply to the conduct in question.”). See also *Adair v State, Dept of Ed*, 474 Mich 1027, 1039, 1051, 1053; 709 NW2d 567 (2006) (“The ‘appearance of impropriety’ standard is relevant not where there are specific court rules or canons that pertain to a subject, such as judicial disqualification, but where there are no specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct.”). Under *In re Haley* and *Adair*, the “appearance of impropriety” standard does not govern because the specific prohibition in Canon 3(A)(4) controls. The challenged actions relate exclusively to the ex parte communications between the trial judge and elected prosecutor, and Canon 3(A)(4) specifically covers that topic. Nevertheless, we will resolve the issue because it was the sole basis for the trial court’s decision, and it is a large part of the dissent’s focus.

We accept for purposes of discussion that the trial judge’s e-mail communications created an appearance of impropriety, contrary to Canon 2, because the e-mail communications occurred during the trial and did not include defense counsel. As the trial court noted, members of the public may perceive some gamesmanship when a trial judge communicates with the head prosecutor while a criminal trial is underway, and the communications spawned from testimony in the trial. That perception is legally questionable, but is one that we accept for purposes of resolving this matter.

Even accepting that the trial judge’s communications created the appearance of impropriety, defendant was still not entitled to a new trial because the trial judge’s conduct did not “influence[] the jury” in any way. *Stevens*, 498 Mich at 171. A defendant must overcome a significant hurdle to show judicial bias when the alleged misconduct occurred outside the presence of a jury. *United States v Morrow*, 977 F2d 222, 225 (CA 6, 1992) (The Court found that the threat of prejudice is diminished when an otherwise inappropriate judicial act or remark is made outside of the jury’s presence); *United States v Smith*, 706 Fed Appx 241, 254 (CA 6, 2017).

Because the judge’s questions to the elected prosecutor did not relate to or bear on any substantive matter at trial, nor was the jury ever aware of the e-mails, we conclude the judge’s e-mail questions to the elected prosecutor did not influence the jury in any way. Moreover, defendant’s arguments in the motion for new trial, which were premised on conjecture that the prosecuting attorney received an unfair tactical advantage from these e-mails, provided no specific instance or actual evidence showing defendant was prejudiced by the judge’s conduct. While defendant argues that the prosecution received an unfair tactical advantage because the communications could have altered the prosecution’s theory of the case, that argument is difficult to accept because the prosecuting attorney raised the problems with the MSP investigation during opening statements, which occurred before the first e-mail was sent. So too did the trooper’s testimony concerning some of the problems with the investigation. The prosecution’s opening statement is consistent with its closing arguments, in which the prosecuting attorney again

acknowledged the inadequacies of the investigation. The record does not support even an inference that the e-mails provided any advantage or altered any tactics by the prosecution. It cannot be said that the communications evidenced anything more than inquiries regarding the investigation process, and there is nothing beyond rank speculation that the communications caused defendant any prejudice. Consequently, the trial judge's e-mail exchange with the elected prosecutor did not violate defendant's due process rights, and the trial court abused its discretion in granting the motion for new trial.

Our divergence with the dissent comes down to several disagreements. First, we simply do not read into these short e-mails an intent by the judge to assist the prosecution in presenting its case, and nor did the trial court. To read these e-mails in such a way is unreasonable given the actual words of the e-mails and the responses from the prosecutor, which reveal an understanding that the questions related to administrative processes in general, not about how the case itself was proceeding. Additionally, to read these e-mails in the way the dissent does gives no credence to the presumption of impartiality, as the dissent places the worst possible gloss into the meaning of the e-mails. Second, the dissent overlooks the fact that the trial prosecutor already raised the issue of the trooper's partially deficient investigation, as well as the trooper's testimony, both of which occurred before the first email was sent. Indeed, the dissent concedes that it is merely speculating about whether the trial prosecutor altered her strategy in light of the e-mails, yet the record unequivocally shows that this was not the case. Third, we see no possibility of prejudice to defendant when neither trial attorney nor the jury knew of the e-mails.

We cannot accept the legal conclusion that questions sent from a trial court to an elected prosecutor about how certain aspects of a criminal investigation are handled—questions that neither the trial attorney, defense attorney, nor jury were aware of—necessitate a new trial because the e-mails were sent during trial. We agree that the timing was poor, but other than the timing, nothing within the e-mails or what actually occurred at trial warrants the conclusion that a new trial was warranted.

Because judicial misconduct was not a proper basis on which to grant defendant a new trial, we must address defendant's remaining arguments that he was entitled to a new trial on the basis of ineffective assistance of counsel and prosecutorial misconduct.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues he was denied the effective assistance of counsel because his trial attorney failed to adequately investigate and challenge the case against him.

The question of whether a defendant is denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* To the extent we must engage in statutory interpretation, our review is de novo. *People v Cannon*, 206 Mich App 653, 654-655; 522 NW2d 716 (1994).

A fundamental rule of statutory interpretation is to determine the purpose and intent of the Legislature in enacting a provision. The Legislature is presumed to have intended the meaning it plainly expressed. Where the language of a statute

is clear, there is no need for interpretation and the statute must be applied as written. [*Id.* at 655 (citations omitted).]

Trial counsel is presumed effective and defendant must overcome a strong presumption that a trial counsel's performance was sound trial strategy. *Id.* at 278. To succeed on an ineffective assistance of counsel argument, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that he was prejudiced by counsel's performance." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015) (quotation marks and citations omitted). This second prong requires defendant to show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This Court will not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

"Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A trial counsel's failure to conduct a reasonable investigation may constitute ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 51-55; 826 NW2d 136 (2012). "Counsel always retains the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 52 (quotation marks and citation omitted). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Defendant's motion for new trial argued there were two reasons he was denied effective assistance of counsel—first, because defense counsel failed to investigate the victim's assertions of fact regarding the color scheme of the bathroom where the sexual assaults occurred, and second, because counsel failed to investigate and present evidence of the victim's prior allegation of sexual assault by another individual. According to defendant, information about the victim's prior sexual assault allegation was essential to impeach the victim's credibility. We address each argument in turn.

1. COLOR SCHEME OF THE BATHROOM

Defendant's first argument arises from the victim's testimony regarding the color scheme of the bathroom where the sexual assaults took place. During trial, the victim testified defendant first sexually assaulted her on the evening of her father's wedding in December 2015. In describing the bathroom on that day, the victim said, "the walls were orange. And there was an orange shower curtain. And there was flowers, it was a flower[-]themed bathroom There was . . . an orange rug in front of . . . the toilet." As discussed, the sexual assaults resumed when the victim began her Friday night ritual of sleeping over at the Heppes' home, some months after the first sexual assault. By this time, the victim reported the bathroom décor had changed to "a peacock theme, it was . . . blue." The victim described the new bathroom rugs as "[l]ight blue . . . with . . . yarn on top."

Defense counsel made several challenges to the victim's description of the bathroom. For instance, on cross-examination, defense counsel asked the victim to confirm the bathroom rugs

given to Trooper Desch by Jane “were absolutely never in [the] bathroom.” Defense counsel also called witnesses whose descriptions of the bathroom differed from the victim’s. For example, Jane testified the décor was changed from orange-to blue-themed in “like 2012, 2013, somewhere in there,” before the December 2015 sexual assault. Brouke also testified the color scheme changed from orange to “teal-y blue” in about 2013.

According to defendant, his counsel should have more vigorously investigated the victim’s report that the bathroom was orange-themed in December 2015 when the first sexual assault took place. Specifically, defendant pointed out that Brouke had pictures on her laptop “complete with electronic date and time stamp” showing the bathroom was blue-themed in December 2015, and his counsel dismissed the importance of the photographs and refused to offer them into evidence. Counsel proceeded in this manner even though, defendant argues, the photographs were essential to his case because counsel could have impeached the victim’s testimony with these photographs, resulting in a “domino effect” to her credibility. The trial court disagreed with defendant’s position, noting there were a number of issues with these photographs, including admissibility and foundation.

We conclude that defense counsel’s actions neither fell below an objective standard of reasonableness, nor prejudiced defendant as a result of counsel’s actions. As noted, defense counsel recognized the discrepancies regarding the color scheme of the bathroom, as defense counsel not only challenged the victim regarding her description of the bathroom, but also called two witnesses who testified the bathroom redecoration predated the December 2015 sexual assault. Because defense counsel attempted to counter the victim’s description of the bathroom, defendant’s argument that defense counsel should have *also* sought to introduce photographic evidence of the bathroom décor, impermissibly asks us to apply the “benefit of hindsight” and second-guess trial strategy—something this Court will not do. *Unger*, 278 Mich App at 242-243.

In furtherance of this conclusion, we note that while defendant’s arguments focus heavily on the discrepancies in witness testimony, they do not account for the consistencies amongst the witnesses. While the victim testified that the *first* sexual assault took place when the bathroom was orange, she also testified many other assaults took place when the bathroom was blue. The victim’s description that the bathroom was eventually changed to “a peacock theme, it was blue,” is largely consistent with the testimony from Jane and Brouke, each of whom testified the bathroom had a blue, peacock theme. Though there were discrepancies in the testimony, counsel was not ineffective because he in fact highlighted the discrepancies. “[I]t is the role of the jury, not this Court, to determine the weight of the evidence or the credibility of witnesses.” *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). On this record, it appears the jury either concluded that the discrepancies about the bathroom décor did not exist or did not detract from the other evidence indicating defendant’s guilt. Therefore, the trial court correctly rejected this argument.

2. PRIOR SEXUAL ASSAULT ALLEGATIONS

We next address defendant’s argument that he was denied effective assistance of counsel because of defense counsel’s failure to investigate and enter into evidence a prior allegation by the victim of a sexual assault by another individual. According to defendant, evidence of this prior allegation was critical because it showed the victim was not a virgin before the alleged sexual

assaults and because it was evidence the victim suffered from anxiety and depression before the alleged assaults by defendant. By failing to admit this evidence, defendant argues, his counsel was unable to effectively impeach several prosecution witnesses. The trial court disagreed, concluding that the evidence was inadmissible because “[defense counsel] might have thought that it might have been detrimental to the . . . interests of the defendant.”

Defendant’s argument on this point holds no merit. Michigan’s rape-shield law states:

(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim’s past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j.]

The evidence at issue—the victim’s allegation of sexual assault by another individual—does not fall under either of the statutory exceptions to the statute. By the statute’s plain language, evidence of the victim’s prior allegations of sexual assault was inadmissible at trial. “Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.” *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Consequently, defense counsel was not ineffective for failing to offer into evidence the victim’s prior allegation of sexual assault.

C. PROSECUTORIAL MISCONDUCT

Defendant also argues the prosecutor committed misconduct⁶ when the prosecutor elicited “false and misleading” testimony from witnesses. “We review de novo claims of prosecutorial misconduct to determine whether [a] defendant was denied a fair and impartial trial.” *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. Further, the propriety of a prosecutor’s remarks depends on the particular facts of

⁶ While “we recognize that the phrase ‘prosecutorial misconduct’ has become a term of art in criminal appeals, we agree that the term ‘misconduct’ is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor’s conduct violates the rules of professional conduct or constitutes illegal conduct.” *Cooper*, 309 Mich App at 87-88. The arguments here, which allege that the prosecutor garnered false testimony, would under *Cooper* be an argument for a finding of prosecutorial misconduct (as opposed to error) for if true, the prosecutor would be acting contrary to ethical rules. See Michigan Rules of Professional Conduct, Rule 3.3(a)(3).

each case. Prosecutors are free to argue the evidence and any reasonable inferences arising from the evidence, and need not confine argument to the blandest of all possible terms. [*Id.* at 451 (quotation marks and citations omitted).]

“It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant’s due process protections guaranteed under the Fourteenth Amendment.” *Aceval*, 282 Mich App at 389. The focus of this inquiry looks to whether the testimony affected the outcome of the trial, and not to the “blameworthiness of the prosecutor.” *Id.* at 390.

Defendant’s arguments are premised on the same set of facts as his second argument alleging ineffective assistance of counsel. That is, defendant contends (1) the prosecutor knew about the prior allegations of sexual assault by the victim and proceeded to garner false testimony that the victim was a virgin at the time of the first sexual assault, and (2) the prosecutor sought false testimony that the victim suffered mental health conditions resulting from the sexual assaults by defendant. According to defendant, the victim’s mental health conditions arose after the other sexual assault and not from any sexual assault by defendant. We reject these arguments.

First, defendant erroneously alleges prosecutorial misconduct because the prosecutor told the jury the victim lost her virginity on the night of the first sexual assault. This is a meritless argument because the victim’s virginity is not a critical element of the charged offenses.⁷ Accordingly, it does not matter whether jury members believed whether the victim was a virgin

⁷ Again, defendant was convicted of one count of CSC-I, MCL 750.520b(1)(f), which states, “an actor may be found guilty under MCL 750.520b(1)(f) if the actor (1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration.” *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). Defendant was also convicted of one count of CSC-II under MCL 750.520c(1)(f), which provides:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

* * *

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v). [*People v Alter*, 255 Mich App 194, 202; 659 NW2d 667 (2003), citing MCL 750.520c(1)(f).]

Defendant also received two convictions of CSC-III under MCL 750.520d(1)(a) and (b). Under MCL 750.520d(1)(a), “[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age.” *In re Tiemann*, 297 Mich App 250, 262; 823 NW2d 440 (2012) (emphasis omitted). “The required elements [of MCL 750.520d(1)(b)] are: (1) defendant engaged in sexual penetration with the victim, and (2) force or coercion is used to accomplish the sexual penetration.” *Eisen*, 296 Mich App at 333.

because that question was not outcome determinative. See *Aceval*, 282 Mich App at 389. Further, there was no testimony or evidence presented that the victim was a virgin before the alleged assault. Indeed, the only time the jury heard a report that the victim was a virgin was during the prosecution's opening and closing arguments, but, as stated, the trial court instructed the jury that the lawyers' statements and arguments are not evidence. Again, juries are presumed to follow instructions, and we discern no error on this basis. *Graves*, 458 Mich at 486.

We also reject defendant's argument that the prosecutor committed misconduct by eliciting perjured testimony about the victim's mental health. Specifically, defendant alleges the prosecutor sought false testimony from several witnesses who testified the victim suffered from mental health conditions for a period of time after the sexual assaults by defendant ended. Perjury has been defined as "a willfully false statement regarding any matter or thing, if an oath is authorized or required." *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). As noted, a prosecutor's "knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *Aceval*, 282 Mich App at 389. Thus, to prove prosecutorial misconduct on the basis of perjury, a defendant must show two things—first that a witness knowingly made a false statement, and second, that the prosecutor knowingly elicited the false statement. Defendant's argument fails on each of these requirements. Indeed, defendant makes no assertion the witnesses themselves made "willfully false statement[s]" to the trial court. *Lively*, 470 Mich at 253. Moreover, defendant does not present any evidence the prosecutor knowingly sought false testimony. *Aceval*, 282 Mich App at 389. While defendant surmises "the prosecutor's office possessed information . . . that directly contradicted the testimony of its most important witness," defendant presents no evidence to this effect. There is simply nothing on this record from which we could conclude the prosecutor suborned perjury amounting to prosecutorial misconduct. Thus, we reject defendant's argument on this basis.

III. CONCLUSION

The trial court's order granting defendant a new trial is reversed.

/s/ Christopher M. Murray
/s/ Jane E. Markey