

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 10, 2013

v

LAWRENCE JOSEPH ABELA,

Defendant-Appellant.

No. 307768
Oakland Circuit Court
LC No. 2010-234325-FH

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based conviction of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(c), and fourth-degree CSC, MCL 750.520e(1)(c). The trial court sentenced defendant to concurrent prison terms of 2-1/2 to 15 years for the third-degree CSC conviction and one to two years for the fourth-degree CSC conviction. We affirm.

Defendant was convicted of engaging in acts of digital penetration and sexual contact with the adult, mentally-disabled daughter of his former girlfriend, with whom he lived. The victim's mother ended her relationship with defendant in May 2010, but allowed defendant to continue residing with her and the victim until defendant found a new place to live.

The prosecution presented evidence that the victim's mother became more forceful in her efforts to make defendant leave her apartment. Following an argument at a restaurant on July 8, 2010, the group returned to the victim's mother's apartment and defendant instructed the victim's mother to do some laundry. The victim testified at trial that after returning from dinner with defendant and her mother, defendant pulled her into her mother's bedroom while her mother was downstairs doing the laundry. The victim stated that defendant touched her "who," which is another name for her vagina, and her butt, and that defendant put his finger inside her vagina. After defendant left the apartment the next morning, the victim told her mother that defendant had touched her in "wrong places." The victim also reported defendant's conduct to a certified nursing assistant, Phyllis Armstead, who was assisting the victim with life skills. The victim's mother testified that she instructed defendant to leave her apartment, but delayed making a report to the police for a few days. The defense theory at trial was that the victim's mental disability made her susceptible to suggestibility by her mother and others, and that the victim's mother influenced the victim into accusing defendant of sexual assault because she

wanted defendant out of her apartment. Defense counsel presented an expert witness to support this theory.

Defendant raises numerous issues on appeal, some through previously retained appellate counsel, and many others in a pro se supplemental brief filed after appellate counsel was permitted to withdraw.

I. SUFFICIENCY OF EVIDENCE

Defendant challenges the sufficiency of the evidence in both CSC convictions. When considering a challenge to the sufficiency of the evidence, an appellate court “reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.” *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of a crime. *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). The prosecution need not negate every theory consistent with innocence, but must prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Chapo*, 283 Mich App 360, 363-364; 770 NW2d 68 (2009). Here, defendant was convicted of engaging in sexual penetration and sexual contact with a person he knew or had reason to know was “mentally incapable.” MCL 750.520d(1)(c); MCL 750.520e(1)(c).

A. FORMER APPELLATE COUNSEL’S ARGUMENTS

We disagree with former appellate counsel’s argument that the evidence was insufficient to establish that the victim was “mentally incapable.” “[M]entally incapable” is defined in MCL 750.520a(i) to mean that “a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.” The rationale for prohibiting sexual acts with a mentally incapable person is that such a person is presumed incapable of truly consenting to sexual acts. *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998).

The prosecution presented overwhelming evidence that the victim had limited cognitive abilities. Every expert and lay witness testified regarding the victim’s limited level of mental functioning. The prosecution’s expert, Jackson Turner, testified that his evaluation of the victim revealed that she had an IQ that placed her in the range of mild mental retardation. The defense expert, Dr. Firoza Van Horn, did not personally evaluate the victim, but opined from the information she reviewed that the victim was operating at an even lower mental-age level than indicated by Turner.

Whether the victim’s cognitive limitations rendered her incapable of appraising the nature of her conduct during the charged sexual acts is a separate inquiry from her level of mental competency. In *Breck*, 230 Mich App at 453-455, this Court, relying on the reasoning in *People v Easley*, 42 NY2d 50; 396 NYS2d 635; 364 NE2d 1328 (1977), which involved a similar New York statute, concluded that the “mentally incapable” element requires an assessment of the person’s ability to understand the physical act and to appreciate nonphysical

factors, such as the moral quality of the act. This Court found sufficient evidence that the victim was mentally incapable where a psychologist described the victim as mentally retarded and as lacking an ability to make an informed decision whether to engage in sexual relations. *Breck*, 230 Mich App at 455-456. In another case, *People v Cox*, 268 Mich App 440, 445-446; 709 NW2d 152 (2005), this Court found sufficient evidence that a victim was mentally incapable where the evidence supported a finding that “regardless of the victim’s awareness of the events as they occurred, he did not understand the nonphysical aspects of the sex acts and was mentally incapable of consenting to the sexual relationship with defendant.”¹ Unlike in *Cox*, however, there was no contention in this case that the victim consented to sexual acts with defendant. Rather, the defense theory at trial was that the victim’s allegations were the product of her susceptibility to suggestibility.

We note that limits on a person’s cognitive abilities are not dispositive of whether a person is capable of appraising the nature of his or her conduct in a sexual encounter. As a New York court explained in *People v Cratsley*, 86 NY2d 81, 85-86; 629 NYS2d 992; 653 NE2d 1162 (1995):

“Mental retardation” is not a disease, disorder or disability, but a less-than-satisfactory administrative term used to identify the condition of a broad spectrum of people whose common trait is inadequate cognitive ability to meet the demands of society. Such an impairment may arise from any number of causes, including birth defect, head injury, disease and environmental factors, conditions leading to no common symptomatology in physiology, psychology, intellect or affect. Mental retardation is not necessarily a static condition, for experience has shown that with effective training and support, individuals are able to lead increasingly “normal” lives. [Citations omitted.]

Nonetheless, cognitive abilities are a factor affecting a person’s ability to assess his or her conduct during a sexual encounter. Individuals who observe that person on a daily basis may also shed light on the person’s ability to understand and cope with a sexual encounter. *Id.* at 87-88.

Although the evidence in this case indicated that the victim was able to recognize that defendant touched her in “wrong places,” there was also evidence that the victim’s cognitive deficits limited her ability to respond to situations or changing circumstances. The victim’s certified nursing assistant, Armstead, testified that the victim was not able to cross a street by herself because the victim could not adequately process the information required for a safe crossing. The defense expert, Dr. Van Horn, also explained how a person with low cognitive abilities has problems dealing with change. Considering the evidence of the victim’s mental deficits and the evidence that defendant removed the victim from a situation of her normal routine and placed her into a position where she was required to formulate a quick response to his actions, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that

¹ The federal court granted conditional habeas corpus in *Cox* on other grounds. *Cox v Curtin*, 698 F Supp 2d 918 (WD Mich, 2010).

the victim's mental deficits rendered her incapable of appraising the nature of her conduct. The evidence was sufficient to satisfy the "mentally incapable" element of the charged offenses. In addition, the evidence that defendant had resided in the same apartment as the victim and her mother for several months was sufficient to enable the jury to find beyond a reasonable doubt that defendant knew or had reason to know that the victim was mentally incapable.

B. DEFENDANT'S SUPPLEMENTAL BRIEF

We reject the argument in defendant's supplemental brief that the victim could not be mentally incapable because she was found competent to testify as a witness. The determination whether a witness is competent to testify is a judicial determination. MRE 601. The focus of a witness's competency to testify is on the witness's capacity and sense of obligation to testify truthfully and understandingly. *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). If a witness is deemed competent to testify under MRE 601, the weight and credibility of that witness's testimony remains a question for the jury. *Id.* at 775; see also *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Because the determination whether a witness is competent to testify under MRE 601 and the determination whether a person is mentally incapable within the meaning of MCL 750.520a(i) are based on different considerations, the trial court's determination that the victim was competent to testify was not dispositive of whether she was mentally incapable.

We also reject defendant's argument that the prosecution failed to negate all possible reasonable theories of innocence. The prosecution was only required to prove its own theory beyond a reasonable doubt. *Nowack*, 462 Mich at 400; *Chapo*, 283 Mich App 363-364.

We also reject defendant's argument that the evidence was insufficient to establish the necessary element of sexual penetration for defendant's third-degree CSC conviction. Defendant's reliance on *People v Borders*, 37 Mich App 769; 195 NW2d 331 (1972), is misplaced because that case preceded the adoption of the criminal sexual conduct statutes, MCL 750.520a *et seq.*, under which defendant was convicted. See *People v Oliphant*, 399 Mich 472, 490 n 6; 250 NW2d 443 (1976). "Sexual penetration" is defined in MCL 750.520a(r) as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." It is sufficient that there be penetration of the labia majora. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). Here, the victim's testimony that defendant put his finger inside her "who," or vagina, was sufficient to prove the element of penetration as defined by MCL 750.520a(r). Independent physical corroboration of the victim's testimony was not necessary. MCL 750.520h.

II. EXPERT TESTIMONY

A. FORMER APPELLATE COUNSEL'S ARGUMENTS

Defendant's former appellate counsel argues that the prosecution's expert, Jackson Turner, was not qualified to provide expert testimony under MRE 702. Because defendant did not object to the challenged testimony at trial, this issue is unpreserved. MRE 103(a)(1). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People*

v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). To be entitled to relief, defendant must establish “(1) that the error occurred, (2) that the error was ‘plain,’ (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012), citing *Carines*, 460 Mich at 763.

MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In this case, defense counsel stated at trial that he had no objection to Turner’s qualification as an expert in clinical psychology. The question presented on appeal involves whether Turner applied principles and methods reliably to the facts of this case and whether Turner’s testimony was helpful to assist the jury in determining whether the victim was mentally incapable.

The threshold inquiry under MRE 702 is whether the proposed testimony will “assist the trier of fact to understand evidence or to determine a fact in issue.” *People v Kowalski*, 492 Mich 106, 121; 821 NW2d 14 (2012) (opinion of KELLY, J). This requirement is not satisfied if proffered testimony is not relevant or involves a matter within the common understanding of an average juror. *Id.*; see also *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995).

In this case, Turner provided testimony regarding his evaluation of the victim’s mental ability level, using the third-edition of the Wechsler Adult Intelligence Scale (WAIS). We agree that the determination whether the victim was mentally incapable required an assessment of several different factors. As indicated in *Cratsley*, 86 NY2d at 87, a person’s intellectual, emotional, social, and psychological resources all affect such a determination. But considering that one of the statutory requirements for being “mentally incapable” is that a person suffer from a mental disease or defect, MCL 750.520a(i), that the victim’s IQ is probative of that issue, and that the significance of a particular IQ level is outside the common knowledge of a jury, we reject defendant’s argument that Turner’s testimony was plainly inadmissible under MRE 702. While other factors may be relevant to a person’s ability to appraise the nature of his or her conduct, that person’s level of cognitive understanding is also probative of that issue, and Turner’s testimony was relevant to assist the jury in understanding the victim’s level of cognitive understanding.

Also, while proposed expert testimony must meet all requirements of MRE 702 to assist the trier of fact, *Kowalski*, 492 Mich at 121, defendant does not cite any testimony in support of his argument that Turner failed to apply principles and methods reliably to the facts of this case. A defendant may not leave it to this Court to search for factual support to sustain or reject his

argument. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Defendant has not met his burden of establishing a plain error.

We also reject any suggestion that Turner's testimony should have been excluded because he did not address the circumstances of the specified sexual acts, i.e., whether the victim was mentally incapable at the time of the acts. Expert testimony may be admissible even if it concerns an ultimate issue in a case. MRE 704; *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). That does not mean, however, that expert testimony is inadmissible if a direct opinion is not rendered on an ultimate issue. The expert testimony is admissible so long as it may assist the jury and satisfies other foundational requirements. *Id.* at 107, 115. Defendant has not established any expert testimony that was clearly inadmissible and, accordingly, has not met his burden of establishing a plain error. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763.

We also reject defendant's alternative claim that defense counsel was ineffective for not objecting to Turner's testimony at trial. Because defendant did not raise an ineffective assistance of counsel claim in an appropriate motion in the trial court and this Court denied his motion to remand, our review of this issue is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). To establish ineffective assistance of counsel, defendant bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must establish that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Vaughn*, 491 Mich at 669. Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 670.

Here, defendant has not established any objectionable testimony by Turner. Because defendant has not established any meritorious basis for an objection, and counsel need not make a futile objection, *Horn*, 279 Mich App at 39-40, this ineffective assistance of counsel claim cannot succeed. Further, considering that defendant's own expert, Dr. Van Horn, testified that the victim was "mentally incapable" and had low cognitive abilities, defendant has failed to establish that he was prejudiced by Turner's testimony. Although this case involved a credibility dispute, the principal disputed issue at trial was whether the victim gave credible testimony regarding the sexual acts, not whether the victim was mentally incapable.

Lastly, because defendant does not identify any additional facts that would require development at a *Ginther*² hearing, his request for a remand is denied. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

B. DEFENDANT'S SUPPLEMENTAL BRIEF

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant argues in his supplemental brief that Turner should not have been allowed to testify without the underlying data for his opinion. Because defendant failed to object to Turner's testimony on this basis at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763.

MRE 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Although the prosecution did not introduce the raw data underlying Turner's assessment of the victim's IQ, it is clear from the testimony of Dr. Van Horn that she had reviewed the raw data in reaching her opinion regarding the victim's diminished capacity. In fact, Dr. Van Horn testified that the information she reviewed led her to conclude that the victim had an even younger mental-age level than indicated by Turner. Other lay witnesses, such as Armstead, also provided testimony regarding the victim's diminished cognitive abilities. Because Turner's testimony was not determinative of whether the victim had diminished cognitive abilities, let alone whether she was mentally incapable as defined in MCL 750.520a(i), defendant's substantial rights were not affected by the prosecution's failure to introduce the raw data underlying Turner's testimony. Therefore, reversal on this ground is not warranted.

Defendant also argues that expert testimony should have been excluded under MRE 403 because it was more prejudicial than probative. Defendant fails to identify the particular testimony that he believes should have been excluded. Assuming that defendant's argument is directed at Turner's estimate of the victim's mental age at 11 or 12 years based on his evaluation of her general cognitive abilities, we find no plain error. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763. All evidence is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow the use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). In this case, every expert and lay witness, except for the victim, gave some type of estimate regarding the victim's mental age. Moreover, an essential element of the charged offenses required the prosecutor to prove that the victim was "mentally incapable." The victim's mental-age level was probative of that element. Under these circumstances, we find no basis for concluding that Turner's testimony should have been excluded under MRE 403.

Defendant also argues that defense witnesses Dr. Van Horn and Gabriella Ahlstrom should not have been allowed to provide expert testimony without the underlying data for their opinions. Contrary to what defendant argues, Ahlstrom did not provide expert testimony at trial. In any event, both of these witnesses were called by defense counsel. Defendant cannot complain about testimony that he intentionally introduced. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995) ("a party cannot request a certain action of the trial court and then argue on appeal that the action was error"). Because Van Horn and Ahlstrom were called as defense witnesses, defendant waived any challenge to the admissibility of their testimony. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). A waiver extinguishes any error. *Id.* at 216.

III. ADJOURNMENT

A. FORMER APPELLATE COUNSEL'S ARGUMENTS

We next consider defendant's argument that the trial court erred by denying a defense request for an adjournment on the first day of trial to enable defendant to retain new counsel. We review a trial court's denial of a request for an adjournment to allow the defendant to retain counsel of his choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Issues of constitutional law are reviewed de novo. *Vaughn*, 491 Mich at 650.

This Court considers the following factors when evaluating a defendant's claim that an adjournment of trial should have been granted to allow the defendant to retain new counsel:

"(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision." [*Akins*, 259 Mich App at 557, quoting *People v Echavarría*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

With respect to the first factor, defendant asserted a constitutional right to retain counsel of choice. However, that right is not absolute, *Akins*, 259 Mich App at 556-557. A court must balance the defendant's right to counsel of choice against the public interest in the prompt and efficient administration of justice to determine if the right to choose counsel was violated. *Id.* at 557.

With respect to the second factor, a significant dispute regarding strategy may implicate the defendant's right to counsel of choice. See *Carlson v Jess*, 526 F3d 1018, 1027 (CA 7, 2008). But it is also appropriate to consider whether the defendant has a legitimate complaint regarding counsel's performance. *Akins*, 259 Mich App at 558. In this case, defendant asserted a conflict of interest with counsel, but as the trial court determined, there was no showing of any conflict under the canons of ethics. See MPRC 1.7 and *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 199-202; 650 NW2d 364 (2002); see also *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998) (an actual conflict of interest that adversely affects an attorney's performance violates a defendant's Sixth Amendment right to counsel). Rather, the dispute concerned defense counsel's failure to follow defendant's instructions with respect to pretrial discovery and motions, principally defense counsel's failure to file a motion to require the victim to submit to a physical examination. The trial court indicated that it would not have granted the motion had it been brought. As more fully explained in part V of this opinion, we agree that there was no basis for compelling the victim to submit to a physical examination. Because defendant failed to show a legitimate complaint regarding counsel's performance, the second factor weighs against defendant's request for an adjournment.

Even assuming that defendant's difference of opinion with counsel constituted a bona fide dispute, however, defendant was free under the trial court's ruling to represent himself or retain new counsel. Moreover, defendant informed the court that he had discharged his

previously retained counsel for failure to file a motion for a physical examination, and a previously scheduled trial was adjourned to enable new counsel to conduct discovery. Despite the trial court's previous accommodation, new counsel did not file a motion for a physical examination. Although the trial court did not specifically address whether defendant was attempting to delay the rescheduled trial, because defendant did not show an actual conflict of interest, failed to establish any legitimate concern regarding his counsel's performance, and failed to offer any reasonable explanation for his delay in seeking the adjournment to again retain new counsel, the trial court did not abuse its discretion in denying an adjournment. Defendant was not deprived of his right to counsel of his choice.

B. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant presents additional arguments in his supplemental brief regarding the trial court's denial of the motion for an adjournment. While comments by defense counsel and the trial court at trial indicate that there was some discussion of this matter at a pretrial hearing on October 21, 2011, this does not affect our determination that the trial court did not abuse its discretion by failing to further adjourn the trial.

We find no merit to defendant's suggestion that the October 21, 2011, proceeding was "merged" into the October 24, 2011, trial transcript, or otherwise constituted a "forgery." To overcome the presumption that a transcript is accurate, a defendant must seasonably seek relief, state the inaccuracy with specificity, and provide some independent corroboration of the inaccuracy. See *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). Defendant must also show that the claimed inaccuracy affects his ability to obtain relief. *Id.* In this case, defendant has not provided any support for his claim that the transcript of the October 24, 2011, trial proceeding is inaccurate. The only deficiency that defendant has established is that neither he nor former appellate counsel took steps to provide this Court with either a transcript or other settled statement of facts regarding the October 21, 2011, pretrial proceeding, as required by MCR 7.210(B). This omission provides no basis for disturbing the trial court's refusal to adjourn the trial.

IV. PSYCHOLOGICAL EXAMINATION

Defendant's former appellate counsel challenges the trial court's pretrial decision denying a defense motion to have the victim undergo a psychological examination. We review a trial court's decision regarding a discovery motion, including whether to compel a complaining witness to submit to a psychiatric examination, for an abuse of discretion. *People v Freeman (After Remand)*, 406 Mich 514, 516; 280 NW2d 446 (1979). There must be a compelling reason to require a complaining sexual assault victim to undergo a psychological examination. *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988); *People v Payne*, 90 Mich App 713, 723; 282 NW2d 456 (1979).

Defendant argues on appeal that a psychological examination of the victim was warranted because her mental condition was a central focus of the evidence at trial, and Turner's evaluation was not sufficiently comprehensive. In his motion below, however, defense counsel specifically argued that the only purpose of the requested evaluation was to evaluate the victim's susceptibility to suggestions by her mother and others. He argued that a psychological

examination would show that the victim was a “tainted” witness. We agree that defendant failed to demonstrate a compelling reason for an examination. Defendant’s purpose involved a matter that was principally within the province of the jury, namely, the credibility of the victim. While inadmissible matters may be discoverable to aid trial preparation, *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993), “[a]n expert cannot be used as a human lie detector to give a stamp of scientific legitimacy to the truth or falsity of a witness’ testimony,” *Graham*, 173 Mich App at 478. See also *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995) (an expert may not provide testimony regarding whether sexual abuse occurred or the victim’s credibility). The trial court did not abuse its discretion in denying the defense request that the victim undergo a psychological examination.

V. PHYSICAL EXAMINATION

A. FORMER APPELLATE COUNSEL’S ARGUMENTS

Defendant’s former appellate counsel also argues that the victim should have been required to undergo a physical examination. Although defendant raised this issue in a pro se motion for a physical examination, the pro se motion was insufficient to preserve this issue for appeal because defendant was represented by counsel at the time of the pro se motion. A defendant has the right to represent himself, but has no substantive right to hybrid representation in a criminal proceeding. *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003); *People v Kevorkian*, 248 Mich App 373, 421-422; 639 NW2d 291 (2001).

In any event, defendant has not established that there was any basis for compelling the victim to submit to a physical examination. We reject any suggestion that the police were obligated to have the victim physically examined because the police are not required to seek and find exculpatory evidence for a defendant. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). More significantly, the third-degree CSC charge was based on an allegation of digital penetration, and defendant failed to make any showing that a physical examination would have been probative of whether an act of digital penetration was committed.

While we have not found any Michigan cases addressing this precise issue, courts in other jurisdictions have taken different approaches in determining whether a sexual assault complainant may be required to undergo a physical examination. The approaches include a compelling-need approach, a material-assistance inquiry, an exculpatory-evidence approach, and a “medically deficient standard, which permits an examination only if the prosecutor’s examination failed to conform to proper medical procedures.” See *State v Barone*, 852 SW2d 216, 221-222 (Tenn, 1993). In *Bartlett v Hamwi*, 626 So 2d 1040, 1043 n 3 (Fla App, 1993), the court observed that, despite the flexibility provided under the compelling-need standard, “in almost all reported cases requests for physical examinations of the victim have been denied under one rationale or another.” In *People v Lopez*, 207 Ill 2d 449, 467; 800 NE2d 1211 (2003), the Illinois Supreme Court held that a court cannot order the complaining witness in a sex offense case to undergo a physical examination, but that the defendant’s inability to obtain an independent physical examination may affect the evidence that the state is allowed to introduce at trial. Regardless of which approach is considered in this case, defendant has not shown that a compelled physical examination of the victim was warranted. We also reject defendant’s related

claim that defense counsel was ineffective for failing to request a physical examination. Because the record does not provide any justification for a compelled physical examination, counsel cannot be faulted for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

We also reject defendant's claim that the trial court erred by failing to give an adverse-inference jury instruction based on the lack of a physical examination. Defendant did not request an adverse-inference instruction at trial. Further, after the jury was instructed, defense counsel responded to the trial court's query whether there were any additions or objections to the instructions by stating, "Not on behalf of [defendant], Judge." Defense counsel's affirmative statement waived any claim of instructional error. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). A waiver extinguishes any error. *Carter*, 462 Mich at 216.

Further, we are not persuaded that defense counsel was ineffective for failing to request an adverse-inference instruction. As previously indicated, the police are not required to seek and find exculpatory evidence for a defendant. *Sawyer*, 222 Mich App at 6; *Miller*, 211 Mich App at 43; see also *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006) (police have no constitutional duty to develop potentially exculpatory evidence). Likewise, a prosecutor is not required to conduct an investigation for a defendant. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Because this case does not involve the suppression of evidence of a physical examination, but rather the lack of a physical examination, an adverse-inference jury instruction would not have been appropriate. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), overruled in part on other grounds *People v Grissom*, 492 Mich 296, 319-320; 821 NW2d 50 (2012). Therefore, counsel was not ineffective for failing to request the instruction. *Fike*, 228 Mich App at 182.

B. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant's reliance in his supplemental brief on MCR 2.311 as authority for the trial court to order a physical examination is misplaced. That rule applies to discovery in civil proceedings and does not apply to this criminal proceeding. See MCR 6.001(D) ("Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by [the criminal procedure rules].")

VI. DEFENDANT'S OTHER ISSUES IN HIS SUPPLEMENTAL BRIEF

We reject defendant's request for relief based on the common-law tender years exception to the prohibition against hearsay in *People v Mikula*, 84 Mich App 108, 116; 269 NW2d 195 (1978). Although this common-law rule was codified and adopted in MRE 803A, effective March 1, 1991, *People v Gursky*, 486 Mich 596, 607-608; 786 NW2d 579 (2010), it has no applicability to this case because the victim is not a child.

We also reject defendant's claim that the victim's mother provided improper testimony regarding his character. Because defendant did not object to the mother's testimony on this ground at trial, this issue is unreserved, and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763; MRE 103(d). Defendant's argument is flawed because "the use of evidence for one purpose simply does not render the evidence

inadmissible for other purposes.” *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). To establish that evidence is relevant under MRE 401, the evidence need only be “material (related to any fact that is of consequence to the action) and have probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence).” *Id.* at 57.

Unlike in *People v Spencer*, 130 Mich App 527; 343 NW2d 607 (1983), the challenged testimony in this case did not involve evidence of poverty or unemployment in a theft case. Rather, the victim’s mother’s reference to defendant’s statement regarding his financial condition was offered to explain why she allowed defendant to remain in her apartment after she broke up with him. In addition, unlike in *People v Hammond*, 394 Mich 627; 232 NW2d 174 (1975), the testimony was not introduced to establish defendant’s bad character. Rather, the prosecutor elicited testimony from the victim’s mother to explain the circumstances that led up to the charged sexual assault. The testimony of the victim’s mother regarding her breakup with defendant and her efforts to get him to leave her apartment provided the context in which the alleged sexual acts occurred. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Indeed, the challenged testimony was relevant to the defense theory that the victim’s accusations were the product of her mother’s influence and efforts to get defendant out of her apartment. No plain error has been shown.

We also find no merit to defendant’s unpreserved argument that the trial court erred by questioning the victim before she testified at trial. The questioning was proper under MRE 601 to determine the victim’s competency as a witness.

Defendant’s claim of judicial bias is also unpreserved because defendant did not raise this issue at trial. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). The trial court’s comments when denying a defense motion to quash the information are insufficient to overcome the heavy presumption of judicial impartiality. *Id.* at 597-598. Accordingly, defendant has not established a plain error.

Defendant raises several issues involving the composition of the jury. Defendant has abandoned his claim that the jury did not represent a fair cross-section of the population by failing to address the merits of this claim in the body of his brief. *Kevorkian*, 248 Mich App at 389. With respect to defendant’s claims that the trial court’s dismissal of a juror for cause tainted the other prospective jurors, and that the trial court’s statements and questions to another juror were intimidating, defense counsel’s failure to object and expression of satisfaction with the jury as seated waived any claim of error. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 784 (1997), overruled in part on other grounds *People v Bryant*, 491 Mich 575, 618; 822 NW2d 124 (2012); see also *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988) (defendant waived a claim that a trial court’s voir dire of prospective jurors deprived him of a fair trial by not objecting to the voir dire and by expressing satisfaction with the jury). A waiver extinguishes any error. *Carter*, 462 Mich at 216. In addition, defendant has not overcome the presumption that defense counsel’s decisions involving the selection of jurors were sound decisions based on reasonable professional judgment. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Therefore, we reject defendant’s claim that defense counsel’s performance in selecting the jury was constitutionally deficient. *Vaughn*, 491 Mich at 669; *Carbin*, 463 Mich at 599-600.

Turning to defendant's argument that the trial court failed to rule on his pro se motions before jury voir dire, we find no basis for relief because, as indicated previously, defendant was represented by counsel, and he had no substantive right to hybrid representation. *Hicks*, 259 Mich App at 527; *Kevorkian*, 248 Mich App at 421-422. To the extent that defendant's argument is directed at a discovery motion filed by defense counsel, we decline to consider this argument because defendant has not sufficiently briefed any claim of error. A party may not leave it to this Court to discover and rationalize the basis of a claim. *Id.* at 389.

Next, to the extent that defendant seeks relief based on claims of prosecutorial misconduct that were not presented to the trial court, we conclude that defendant has not established a plain error affecting his substantial right. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763. The record provides no basis for concluding that the prosecutor's charging decision was ultra vires, unconstitutional, or illegal. *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995); see also *In re Hawley*, 238 Mich App 509, 512; 606 NW2d 50 (1999) (prosecutor's determination of what charges to file will not be disturbed "absent a showing of clear and intentional discrimination based on an unjustified standard such as race, religion, or some other arbitrary classification").

We also find no support for defendant's claim that the prosecutor withheld Turner's evaluation of the victim's competency from the defense. To the contrary, the record indicates that defense counsel received copies of both evaluations by Turner in a letter format.

The record also fails to support defendant's unpreserved claims that the prosecutor made improper closing and rebuttal arguments at trial. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010); *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008); *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). We also reject defendant's argument that the prosecutor improperly discussed the legal concept of reasonable doubt during jury selection. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The record indicates that the prosecutor's questioning of a prospective juror regarding the concept of reasonable doubt was intended to determine whether the juror could fairly decide the case based on the evidence. The prosecutor made it clear that the concept of reasonable doubt would ultimately be explained by the trial court. Further, the trial court later instructed the empanelled jury that "[y]ou have to take the law as I give it to you." The jury was again instructed before deliberations to "[r]emember that you've taken an oath to return a true and just verdict, based only on the evidence and my instructions on the law." This Court applies a presumption that the jury followed these instructions. *Unger*, 278 Mich App at 235.

Defendant also raises other claims of instructional error. As indicated previously, however, defendant waived any challenge to the adequacy of the jury instructions. *Kowalski*, 489 Mich 504-505. However, we shall consider defendant's claims of instructional error as necessary to resolve his claims that defense counsel was ineffective for not requesting proper jury instructions. *People v Eisen*, 296 Mich App 326, 329-330; 820 NW2d 229 (2012). Jury instructions should include all elements of the charged offenses and must not omit material issues, defenses, and theories that are supported by the evidence. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "Even if somewhat imperfect, instructions do not create

error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.* at 143-144.

We disagree with defendant's argument that specific jury instructions distinguishing between competency and consent were necessary to protect his rights. Defendant's argument is flawed because the victim's competency to testify was not an issue for the jury. MRE 601; *Burch*, 170 Mich App at 774-775. Further, MCL 750.520a(i) establishes the "mentally incapable" standard for evaluating the victim's conduct in this case. Because the jury was fairly instructed with respect to its duty to decide both the victim's credibility and the "mentally incapable" element of the charged offenses, defendant has not established any instructional error. In addition, defendant has not established any deficiency in the trial court's jury instructions with respect to expert testimony. Further, the trial court's instruction that the victim's testimony, if believed, could alone be used to prove the charged offenses, was a correct statement of the law. MCL 750.520h. Because defendant has not established any instructional error, there is no merit to his claim that defense counsel was ineffective for failing to object to the instructions or seek additional instructions.

Defense counsel's expression of satisfaction with the jury instructions also waived any claim of error associated with the trial court's instructions on reasonable doubt. Regardless, the trial court instructed the jury in accordance with CJI2d 3.2, which adequately conveys the concept of reasonable doubt. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Accordingly, there was no error.

Similarly, defense counsel's expression of satisfaction with the jury instructions waived any claim that a missing-witness instruction should have been given with respect to two individuals, Weissman and Dr. Prasad, who did not testify at trial. *Kowalski*, 489 Mich 504-505. In any event, it is only where a prosecutor fails to properly excuse a witness on a list provided under MCL 767.40a(3) that a missing-witness instruction may be appropriate. *People v Perez*, 469 Mich 415; 670 NW2d 655 (2003); *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004). Absent a showing that Weissman and Dr. Prasad were on a list provided under MCL 767.40a(3), and a defense objection to the prosecutor's failure to produce them, we are unable to conclude that a missing-witness instruction was warranted.

We reject defendant's additional argument that Sergeant Zupic, who was introduced as the officer in charge of the case, should not have been allowed to remain in the courtroom unless he testified. Defendant's reliance on MCL 767.40, which addresses the filing of the information, and *People v Sims*, 62 Mich App 550; 233 NW2d 645 (1975), which addresses the prosecutor's former duty to produce witnesses before the 1986 amendments of MCL 767.40a, is misplaced. Defendant has not established that Sergeant Zupic's presence in the courtroom amounted to plain error. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763.

We also find no basis for defendant's argument that the prosecutor and the trial court should have provided information to the jury regarding a prior sexual assault accusation. Although evidence that a victim made a prior false accusation of sexual assault is admissible as bearing on the victim's credibility in a CSC case, it is not admissible unless the defendant is able to make an offer of proof with respect to the false accusation. *People v Williams*, 191 Mich App 269, 272-273; 477 NW2d 877 (1991). Defendant failed to make any offer of proof in this case

that the victim made prior false accusations. Defendant's reliance on *Mathis v Berghuis*, 202 F Supp 2d 715 (ED Mich, 2002), is misplaced because the record does not indicate that the prosecutor withheld information contained in police reports. To the contrary, defense counsel acknowledged at a pretrial hearing on October 19, 2011, that he was provided with police reports containing past allegations.

The record also fails to support defendant's claim that defense counsel was ineffective for not introducing evidence that the victim made a prior false accusation of sexual assault, or by failing to cross-examine the victim about prior accusations. It is inappropriate for defense counsel to engage in a fishing expedition by cross-examining witnesses at trial regarding prior accusations with the hope to uncover some basis for arguing that a prior accusation was false. *Williams*, 191 Mich App at 273-274. Given defendant's failure to provide factual support for his claim that the victim made a prior false accusation, this ineffective assistance of counsel claim cannot succeed. *Carbin*, 463 Mich at 600.

Defendant has also failed to establish that defense counsel's questioning of trial witnesses, failure to call additional or different witnesses for the defense, and failure to present an alibi defense deprived him of the effective assistance of counsel. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *Horn*, 279 Mich App at 39. In general, the failure to present evidence constitutes ineffective assistance of counsel only where it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "A substantial defense is defined as one that might have made a difference in the outcome of the trial." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Here, defendant has not identified any factual support for his claim that additional witnesses could have provided a substantial defense. *Carbin*, 463 Mich at 600; see also *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990). Similarly, defendant has failed to establish any record support for this argument that defense counsel was ineffective for failing to interview Sergeant Zupic. *Carbin*, 463 Mich at 600.

Next, we agree with defendant that defense counsel's statements are not evidence. *Papke v Tribbey*, 68 Mich App 130, 137; 242 NW2d 38 (1976). But, "[w]here defense counsel in opening statement recognizes and candidly asserts the inevitable, he is often serving his client's interests best by bringing out the damaging information and thus lessening the impact." *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). This Court will not second-guess defense counsel's strategy of conceding certain points at trial, even when the concession pertains to elements of an offense. *Chapo*, 283 Mich App at 369. Here, it was not unreasonable for defense counsel to concede that defendant resided with the victim and her mother. Indeed, it was part of the defense strategy to argue that the victim's mother prompted the victim's allegations in order to remove defendant from her house. The failure of this chosen strategy does not constitute ineffective assistance of counsel. *Kevorkian*, 248 Mich App at 414-415.

Next, we find no support for defendant's argument that the legality of his arrest might have been challenged at a pretrial hearing on January 27, 2011. Defendant has also failed to establish support for his claim that he was subject to an illegal arrest. In any event, "[t]he invalidity of an arrest does not deprive a court of jurisdiction to try a defendant." *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991). And while evidence obtained as a result of an

illegal arrest may be suppressed, *id.*, defendant does not contend that any evidence obtained in this case was the product of an illegal arrest. Thus, defendant cannot establish that his substantial rights were affected by any illegal arrest. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763. Defendant's inability to establish prejudice from any illegal arrest is also fatal to his ineffective assistance of counsel claim related to this issue. *Carbin*, 463 Mich at 599-600.

We note, however, that there is no record support for defendant's argument that he was arrested without a warrant. To the contrary, the record contains the arrest warrant issued in August 2010. And while defendant asserts that there was a delay in his arrest, it is clear from the January 27, 2011, hearing that defense counsel was not disputing that defendant had turned himself in to the police on September 9, 2010. Where a defendant claims prearrest delay, the pertinent inquiry is whether the defendant's right to procedural due process was violated. *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009). Dismissal may be appropriate if there is actual and substantial prejudice to a defendant's right to a fair trial, and the prosecution intended to gain a tactical advantage from the prearrest delay. *Id.* at 237. Here, defendant has not established any prejudice caused by any prearrest delay.

Defendant has also failed to establish any procedural defect in his circuit court arraignment that warrants relief under the plain-error doctrine. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763. The purposes of the arraignment are to provide formal notice of the charges and an opportunity for the defendant to enter a plea. *People v Nix*, 301 Mich App 195, 207-208; 836 NW2d 224 (2013), lv app pending. But prejudice is required for a defendant to be entitled to relief, even where a circuit court arraignment is not conducted on the information. *Id.* Considering that defense counsel acknowledged receipt of the information and presented defendant's plea of not guilty at the circuit court arraignment, as well as defendant's presence at the preliminary examination where the charges were amended to third-degree CSC and fourth-degree CSC, defendant cannot establish prejudice. *Id.*

With respect to defendant's argument that the preliminary examination transcript contains an inaccuracy, because defendant did not pursue this issue after being afforded an opportunity to review the video of the preliminary examination, we conclude that the issue is not preserved. See *Carines*, 460 Mich at 762 n 7. In addition, defendant has failed to establish any questioning of the victim at trial that overcomes the presumption that the preliminary examination transcript is accurate. *Abdella*, 200 Mich App at 476. The mere fact that testimony at the two proceedings may be viewed as inconsistent does not establish that either transcript is inaccurate. And, absent a showing of any actual error, there is no basis for concluding that defense counsel was ineffective for not correcting the error. *Carbin*, 463 Mich at 600.

Defendant also raises various issues concerning the district court proceedings preceding his bindover on the charges to the circuit court. Because a preliminary examination is not a constitutionally-based procedure, any error committed at the preliminary examination stage is subject to review for harmless error under MCL 769.26. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004); see also *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Because defendant has not established that he was unfairly convicted at trial,

his claims of error at the preliminary examination and the district court arraignment do not provide a basis for relief. *Hall*, 453 Mich at 603.

We also find no merit to defendant's suggestion that trial counsel was ineffective for not moving to quash the information on the basis of insufficient evidence. The record discloses that defendant's original counsel moved to quash the information on this ground and that the trial court denied the motion. Because it would have been futile for replacement counsel to make the same motion, counsel was not ineffective for failing to do so. *Fike*, 228 Mich App at 182.

Defendant also argues that the cumulative effect of the many errors raised in this appeal requires reversal. A court only aggregates actual errors to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Here, defendant has not shown actual errors that have the cumulative effect of undermining confidence in the reliability of the verdict. Therefore, reversal is not warranted on this ground. *Brown*, 279 Mich App at 145-146.

We also reject defendant's argument that the trial court erred by denying his pro se motion for a new trial on the ground that it was "late." Although defendant asserts that he could properly seek relief from his judgment of conviction under MCR 2.612, the trial court's jurisdiction during the pendency of an appeal is still subject to the limitations in MCR 7.208. Because MCR 7.208(A) limits a trial court's authority to set aside or amend the judgment or order appealed during the pendency of an appeal, and because the limited period of concurrent jurisdiction prescribed in MCR 7.208(B) had expired, the trial court lacked jurisdiction to consider defendant's postjudgment motion for a new trial.

Defendant also asserts that he was deprived of the effective assistance of counsel because counsel did not move for a judgment of acquittal. Because defendant had the opportunity to challenge the sufficiency of the evidence on appeal, and because we have already concluded that the evidence was sufficient to sustain defendant's convictions, we reject defendant's claim. Any motion would have been futile.

Lastly, we decline to consider defendant's claims regarding his motion for the production of exhibits and the dangers of proceeding on appeal without appellate counsel because defendant fails to address these issues in the body of his brief, thereby abandoning them. *Kevorkian*, 248 Mich App at 389.

Affirmed.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro