No. 17-2115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOEL GOMEZ,

Petitioner-Appellant,

v.

MARY BERGHUIS, Warden,

Respondent-Appellee.

ORDER

Joel Gomez, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This court construes Gomez's notice of appeal as an application for a certificate of appealability.

A jury found Gomez guilty of domestic assault and ten counts of first-degree criminal sexual conduct. The trial court sentenced Gomez to an effective prison term of 25 to 40 years. The Michigan Court of Appeals affirmed the trial court's judgment, *People v. Gomez*, No. 301706, 2012 WL 4210311 (Mich. Ct. App. Sept. 20, 2012), and the Michigan Supreme Court denied leave to appeal, *People v. Gomez*, 830 N.W.2d 137 (Mich. 2013).

Gomez filed a federal habeas petition, arguing that the trial court violated his rights by admitting certain hearsay and opinion evidence, that there did not exist probable cause to initiate criminal proceedings against him, and that the prosecutor engaged in misconduct. A magistrate judge recommended denying Gomez's petition. Gomez objected to the rejection of his prosecutorial-misconduct claim but explicitly waived his right to appeal the other claims. Over Gomez's objections, the district court adopted the magistrate judge's recommendation, denied Gomez's petition, and declined to issue a certificate of appealability.

To obtain a certificate of appealability, a habeas corpus petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court has rejected a constitutional claim on the merits, the petitioner must demonstrate that jurists of reason would find it debatable whether the district court correctly resolved the claim under the Antiterrorism and Effective Death Penalty Act of 1996. *Miller-El*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In support of his prosecutorial-misconduct claim, Gomez argued that the prosecutor failed to prove his opening statement, misled the jury, improperly vouched for the victim's credibility, argued facts not in evidence, and mischaracterized certain testimony. A petitioner may obtain habeas relief based on a claim of prosecutorial misconduct only if the prosecutor's comments or actions rendered the trial fundamentally unfair. *Hawkins v. Coyle*, 547 F.3d 540, 552-53 (6th Cir. 2008).

Reasonable jurists would not debate the district court's determination that the state courts reasonably rejected Gomez's prosecutorial-misconduct claim because the prosecutor did not mislead the jury or improperly vouch for the victim, the prosecutor's opening statement and arguments were based on reasonable inferences from the evidence presented, and the prosecutor's alleged mischaracterization of a witness's testimony was not so egregious that it rendered Gomez's trial fundamentally unfair.

Accordingly, Gomez's application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL ALEXZANDER GOMEZ,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

Case No. 1:14-cv-407

HON. JANET T. NEFF

OPINION AND ORDER

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R) recommending that this Court deny the petition. The matter is presently before the Court on Petitioner's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order. The Court will also issue a Judgment in this § 2254 proceeding. *See Gillis v. United States*, 729 F.3d 641, 643 (6th Cir. 2013) (requiring a separate judgment in habeas proceedings).

Petitioner presented four habeas corpus claims for review, and the Magistrate Judge found no issue on which to recommend granting habeas relief. In his objections, Petitioner "waives the right to appeal on Claim I (Hearsay Evidence); Claim II (Opinion Testimony); and Claim III (Fourth Amendment)" (Pet'r Obj., ECF No. 11 at PageID.1086). Petitioner's objections are limited to Claim IV (Prosecutorial Misconduct) (*id.*).

APPENDIX B

The Magistrate Judge rejected Petitioner's prosecutorial misconduct claim, finding that the challenged comments and actions presented no issue upon which habeas relief could be granted (R&R, ECF No. 10 at PageID.1078-1084). Petitioner's objections merely reiterate the claims in his petition. His objections fail to pose any specific challenge to, let alone demonstrate any factual or legal error in, the Magistrate Judge's analysis or conclusion. *See Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004) (disfavoring the practice of incorporating prior arguments into objections to a magistrate judge's report).

Having determined Petitioner's objections lack merit, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. *See* RULES GOVERNING § 2254 CASES, Rule 11 (requiring the district court to "issue or deny a certificate of appealability when it enters a final order"). The Court must review the issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

"Where a district court has rejected the constitutional claims **on the merits**, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Upon review, this Court finds that reasonable jurists would not find the Court's assessment of Petitioner's claims debatable or wrong. A certificate of appealability will therefore be denied as to each issue asserted.

Accordingly:

IT IS HEREBY ORDERED that the Objections (ECF No. 11) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 10) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (ECF No. 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Dated: August 31, 2017

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL GOMEZ,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

Hon. Janet T. Neff

Case No. 1:14-CV-407

REPORT AND RECOMMENDATION

This matter is before the Court on Gomez's petition for writ of habeas corpus. In accordance with 28 U.S.C. § 636(b) authorizing United States Magistrate Judges to submit proposed findings of fact and recommendations for disposition of prisoner petitions, the undersigned recommends that Gomez's petition be **denied**.

BACKGROUND

As a result of events allegedly occurring between January 1, 2007, and March 26, 2009, Petitioner was charged with ten (10) counts of First Degree Criminal Sexual Conduct and one charge of domestic violence. (Trial Transcript, October 19, 2010 at PageID.242-43). Several individuals testified at Petitioner's jury trial. The relevant portions of their testimony are summarized below.

Martha Cruz

As of March 26, 2009, Cruz was twelve (12) years of age. (Trial Transcript, October 19, 2010 at PageID.335). On this date, Petitioner, Cruz's step-father, discovered a note "from a boy" written to Cruz. (Trial Transcript, October 19, 2010 at PageID.335-36). Because Cruz "wasn't [supposed] to be talking to boys," Petitioner responded by choking and then slapping Cruz. (Trial Transcript, October 19, 2010 at PageID.336-40). Cruz's mother, Natalie Gomez, later asked Cruz if she was "still a virgin." (Trial Transcript, October 19, 2010 at PageID.338-42). Cruz responded by stating, "ask your husband." (Trial Transcript, October 19, 2010 at PageID.342). Gomez later took Cruz to speak with their pastor and then with the police. (Trial Transcript, October 19, 2010 at PageID.342-44).

In the winter of 2007, Petitioner first sexually assaulted Cruz. (Trial Transcript, October 19, 2010 at PageID.344-49). Specifically, Petitioner attempted to vaginally penetrate Cruz with his penis. (Trial Transcript, October 19, 2010 at PageID.344-49). A "couple weeks later," Petitioner sexually assaulted Cruz by penetrating her vaginally with his penis. (Trial Transcript, October 19, 2010 at PageID.349-50). Petitioner continued to sexually assault Cruz 2-3 times weekly through March 2009. (Trial Transcript, October 19, 2010 at PageID.349-55). At the conclusion of his assaults, Petitioner would often ejaculate onto a blanket or bedspread. (Trial Transcript, October 19, 2010 at PageID.349-55).

After Cruz reported Petitioner's actions to the police, Gomez told Cruz that "she didn't believe [her] and that [she] was lying every day." (Trial Transcript, October 19, 2010 at PageID.355-57). After "a couple of weeks" of hearing her mother accuse her of lying, Cruz told her mother "it didn't happen." (Trial Transcript, October 19, 2010 at PageID.356-57). Cruz told a

psychologist that "my mom didn't believe me so I said it wasn't true." (Trial Transcript, October 19, 2010 at PageID.357). Cruz later wrote a letter recanting her allegations against Petitioner because her mother instructed her to do so. (Trial Transcript, October 21, 2010 at PageID.659-60).

Ben Seal

As of March 2009, Seal was employed as a Trooper with the Michigan State Police. (Trial Transcript, October 19, 2010 at PageID.387-88). Seal was involved in the initial investigation of Martha Cruz's allegations against Petitioner. (Trial Transcript, October 19, 2010 at PageID.388). Cruz was "crying and, you know, visually upset" when she spoke with Seal. (Trial Transcript, October 19, 2010 at PageID.389). Cruz reported to Seal that Petitioner "would regularly come into her bedroom and have sex with her." (Trial Transcript, October 19, 2010 at PageID.389-93).

When Seal asked Cruz if there existed any DNA evidence to support her allegations, Cruz informed Seal that Petitioner often ejaculated on her bedding. (Trial Transcript, October 19, 2010 at PageID.395-96). These items were seized as evidence and submitted for DNA testing. (Trial Transcript, October 19, 2010 at PageID.395-406). After receiving the results of this DNA testing, Petitioner was arrested. (Trial Transcript, October 19, 2010 at PageID.407). During a subsequent interview, Petitioner stated that his wife "had recently been diagnosed with cancer in her private parts area, and there was some diminished sexual activity between the two of them because of that." (Trial Transcript, October 19, 2010 at PageID.405-06). Petitioner then "voluntarily" stated, "I know what you guys are thinking. . .I'm not having sex with Martha because my wife is having physical issues." (Trial Transcript, October 19, 2010 at PageID.406).

Amber Jarnes

Jarnes is a registered nurse who possesses a certification as Sexual Assault Nurse Examiner. (Trial Transcript, October 19, 2010 at PageID.415-18). Jarnes examined Martha Cruz on April 6, 2009. (Trial Transcript, October 19, 2010 at PageID.421). Cruz reported that Petitioner sexually assaulted her on multiple occasions. (Trial Transcript, October 19, 2010 at PageID.421-25). An examination of Cruz's vaginal area revealed an "irregular pattern" located "in the specific area where the majority of injuries from penetration are found." (Trial Transcript, October 19, 2010 at PageID.426-32).

James Henry, Ph.D.

Henry is the Director of the Southwest Michigan Children's Trauma Assessment Center and was permitted to testify as an expert in the area of child sexual abuse. (Trial Transcript, October 20, 2010 at PageID.456-61). If a child who had been sexually assaulted was told by her mother on a daily basis that she was lying, such would "absolutely" cause the child to recant her allegations. (Trial Transcript, October 20, 2010 at PageID.464-69). The family disruption caused by revelations of sexual abuse create "tremendous pressure" on a child to recant. (Trial Transcript, October 20, 2010 at PageID.472-73).

Lisa Champion

As part of the investigation of this matter, DNA samples were obtained from Martha Cruz, Petitioner, and Natalie Gomez and provided to the Michigan State Police. (Trial Transcript, October 20, 2010 at PageID.485-92). An examination of one of the items of bedding submitted for

evaluation revealed the presence of bodily fluids. (Trial Transcript, October 20, 2010 at PageID.495-98). Portions of this bedding were preserved and forwarded to Ann Hunt for DNA analysis. (Trial Transcript, October 20, 2010 at PageID.498).

Ann Hunt

The bedding submitted for DNA testing contained areas of "mixed stains," or areas containing genetic material from two separate people. (Trial Transcript, October 20, 2010 at PageID.517-18). DNA analysis of these mixed stains revealed that it contained Petitioner's DNA and Martha Cruz's DNA. (Trial Transcript, October 20, 2010 at PageID.518-21). Natalie Gomez was excluded as a donor of the DNA discovered in these mixed stains. (Trial Transcript, October 20, 2010 at PageID.521-22).

Chris Shoemaker

Shoemaker, a Michigan State Trooper, assisted Trooper Seal investigate Martha Cruz's allegations against Petitioner. (Trial Transcript, October 20, 2010 at PageID.535-36). Cruz told the Troopers that Petitioner sexually assaulted her "numerous times." (Trial Transcript, October 20, 2010 at PageID.537-40). Cruz also informed Shoemaker that there was bedding that might still contain Petitioner's bodily fluids. (Trial Transcript, October 20, 2010 at PageID.550). This bedding was subsequently seized as evidence. (Trial Transcript, October 20, 2010 at PageID.550-52).

Trooper Shoemaker later participated in an interview of Petitioner. (Trial Transcript, October 20, 2010 at PageID.552). During this interview, Petitioner stated that he and his wife were no longer having sex because she was suffering cancer "in her privates." (Trial Transcript, October

20, 2010 at PageID.555-56). Petitioner then volunteered that this was the reason he was being accused of having sex with his step-daughter. (Trial Transcript, October 20, 2010 at PageID.556).

William Nichols

Nichols is the Senior Pastor at Unity Temple where Petitioner and his family attended. (Trial Transcript, October 20, 2010 at PageID.578). On or about March 31, 2009, Petitioner, Natalie Gomez, and Martha Cruz met with Nichols concerning "an allegation Martha had made about [Petitioner]." (Trial Transcript, October 20, 2010 at PageID.579-80). After learning the nature of Cruz's allegations, Nichols asked Cruz, "is this the truth?" (Trial Transcript, October 20, 2010 at PageID.581). Cruz began "sobbing" and "nodded" that it was true. (Trial Transcript, October 20, 2010 at PageID.581). Nichols then instructed the family to contact the police. (Trial Transcript, October 20, 2010 at PageID.580).

Bobby Smith

Smith is an elder and youth leader at Unity Temple. (Trial Transcript, October 20, 2010 at PageID.583-84). Smith has a "very good" relationship with Martha Cruz, but never spoke with her regarding her allegations against Petitioner. (Trial Transcript, October 20, 2010 at PageID.584-85).

Randall Haugen, Ph.D.

Haugen is a psychologist focusing on abuse and neglect treating both offenders and victims. (Trial Transcript, October 21, 2010 at PageID.592-94). Dr. Haugen was permitted to

testify as an expert in the area of psychology. (Trial Transcript, October 21, 2010 at PageID.595). On May 5, 2009, Haugen met with Martha Cruz pursuant to a referral from Child Protective Services. (Trial Transcript, October 21, 2010 at PageID.595-96). Cruz related to Haugen her allegations against Petitioner. (Trial Transcript, October 21, 2010 at PageID.596). Cruz stated that she made the allegations against Petitioner because she "was angry" and "was lying to get out of some trouble that she was in at the time." (Trial Transcript, October 21, 2010 at PageID.597).

Haugen administered to Cruz "The Million preadolescent Clinical Inventory," the results of which indicated that Cruz "had behavior characteristics of children consistent with her difficulty dealing with limits or the growing disregard for rules, tendency to be somewhat impulsive, decreasing interest in school, conflicts with parents, authority figures are often which are individuals with her profile, and problems with anger impulse control." (Trial Transcript, October 21, 2010 at PageID.599-600). Haugen diagnosed Cruz with Disruptive Behavior Disorder. (Trial Transcript, October 21, 2010 at PageID.604). Haugen acknowledged that "family pressure can cause a recantation" of allegations. (Trial Transcript, October 21, 2010 at PageID.606). Statements Cruz made during the interview indicated to Dr. Haugen that Cruz "was receiving pressure," but he could not determine how much pressure was being applied. (Trial Transcript, October 21, 2010 at PageID.607-08).

Natalie Gomez

Gomez was diagnosed with cervical cancer in 2008. (Trial Transcript, October 21, 2010 at PageID.619). Prior to this diagnosis, Gomez had an active sex life with Petitioner, but following her cancer diagnosis intercourse became "difficult" for her. (Trial Transcript, October

21, 2010 at PageID.619-20). In an attempt to "help [Petitioner] with his needs," Gomez would "help him masturbate." (Trial Transcript, October 21, 2010 at PageID.619-20). At the conclusion of this activity, Petitioner would ejaculate onto various bedding throughout the house including a blanket which was later seized as evidence. (Trial Transcript, October 21, 2010 at PageID.620-24). Gomez conceded, however, that she never shared this information with the police during their investigation of her daughter's allegations. (Trial Transcript, October 21, 2010 at PageID.625, 652).

Paloma Mireles

Mireles is a friend of Martha Cruz. (Trial Transcript, October 21, 2010 at PageID.630). After Cruz made the allegations of sexual abuse against Petitioner, she subsequently wrote a letter recanting her allegations. (Trial Transcript, October 21, 2010 at PageID.630-32). Mireles never heard anybody tell Cruz that she had to recant her allegations. (Trial Transcript, October 21, 2010 at PageID.632).

Michael Guest

Guest is married to Petitioner's sister. (Trial Transcript, October 21, 2010 at PageID.638). After making her allegations of sexual abuse against Petitioner, Martha Cruz later spoke privately with Guest and recanted her allegations. (Trial Transcript, October 21, 2010 at PageID.639-40). When Guest asked Cruz if she understood "how serious this is," Cruz "just kind of was laughing." (Trial Transcript, October 21, 2010 at PageID.640-41).

Maria Mireles

Maria Mireles is Paloma Mireles' Mother. (Trial Transcript, October 21, 2010 at PageID.665). Martha Cruz wrote a letter recanting her allegations against Petitioner after acknowledging to Mireles that she was lying. (Trial Transcript, October 21, 2010 at PageID.666-67).

Following the presentation of evidence, the jury found Petitioner guilty of ten (10) counts of First Degree Criminal Sexual Conduct and one charge of domestic violence. (Trial Transcript, October 21, 2010 at PageID.714-15). Petitioner was sentenced to serve concurrent prison sentences of 25-40 years on the ten criminal sexual conduct convictions and pay court costs on his domestic violence conviction. (Sentencing Transcript, December 3, 2010 at PageID.740-41). Petitioner subsequently appealed his conviction in the Michigan Court of Appeals asserting the following claims:

I. The trial court abused its discretion in allowing testimony to be introduced through prosecution witnesses Ben Seal and Chris Shoemaker, which was inadmissible hearsay and inadmissible pursuant to MCL § 768.27(C).

II. The trial court erred in permitting Amber Jarnes to offer opinion testimony in the matters of sexual assault and penetration.

III. Whether under the Fourth Amendment of the United States Constitution Appellant was denied of his right to be free from unreasonable search and seizure where the Cass County District Court and the Circuit Court proceeded without jurisdiction; the warrant and complaint lacking any indicia of probable cause for the court to initiate proceedings on.

IV. Whether under the 6th and 14th Amendment of the United States Constitution Appellant was denied a

> fair trial where the prosecution, (a) failed to prove his opening statement, (b) improperly misled the jury, (c) improperly bolstering its victims credibility, and (d) argued facts not in evidence.[1]

The Michigan Court of Appeals affirmed Petitioner's conviction. *People v. Gomez*, Case No. 301706, Opinion (Mich. Ct. App., Sept. 20, 2012). Petitioner subsequently moved in the Michigan Supreme Court for leave to appeal asserting claims I, III, and IV identified above. The court denied leave to appeal on the ground that "we are not persuaded that the questions presented should be reviewed by this Court." *People v. Gomez*, Case No. 146235, Order (Mich., May 22, 2013). On April 14, 2014, Petitioner initiated the present action asserting claims I-IV identified above.

STANDARD OF REVIEW

Gomez's petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), as it amended 28 U.S.C. § 2254. The AEDPA amended the substantive standards for granting habeas relief under the following provisions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

[1] Claims I and II were asserted by Plaintiff's appellate counsel whereas claims III and IV were asserted by Petitioner in a separate pro per filing.

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The AEDPA has "modified" the role of the federal courts in habeas proceedings to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Pursuant to § 2254(d)(1), a decision is "contrary to" clearly established federal law when "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an opposite result." *Ayers v. Hudson*, 623 F.3d 301, 307 (6th Cir. 2010) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)).

Prior to *Williams*, the Sixth Circuit interpreted the "unreasonable application" clause of § 2254(d)(1) as precluding habeas relief unless the state court's decision was "so clearly incorrect that it would not be debatable among reasonable jurists." *Gordon v. Kelly*, 2000 WL 145144 at *4 (6th Cir., February 1, 2000); *see also, Blanton v. Elo*, 186 F.3d 712, 714-15 (6th Cir. 1999). The *Williams* Court rejected this standard, indicating that it improperly transformed the "unreasonable application" examination into a subjective inquiry turning on whether "at least one of the Nation's jurists has applied the relevant federal law in the same manner" as did the state court. *Williams*, 529 U.S. at 409.

In articulating the proper standard, the Court held that a writ may not issue simply because the reviewing court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams,* 529 U.S. at

411. Rather, the Court must also find the state court's application thereof to be *objectively* unreasonable. *Bell*, 535 U.S. at 694; *Williams*, 529 U.S. at 409-12. Accordingly, a state court unreasonably applies clearly established federal law if it "identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case" or if it "either unreasonably extends or unreasonably refuses to extend a legal principle from the Supreme Court precedent to a new context." *Ayers*, 623 F.3d at 307. Furthermore, review under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Pursuant to 28 U.S.C. § 2254(d)(2), when reviewing whether the decision of the state court was based on an unreasonable determination of the facts in light of the evidence presented, the "factual determination by [the] state courts are presumed correct absent clear and convincing evidence to the contrary." *Ayers*, 623 F.3d at 308. Accordingly, a decision "adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." While this standard is "demanding" it is "not insatiable." *Id.*

For a writ to issue pursuant to § 2254(d)(1), the Court must find a violation of clearly established federal law "as set forth by the Supreme Court at the time the state court rendered its decision." *Stewart v. Irwin*, 503 F.3d 488, 493 (6th Cir. 2007). This definition of "clearly established federal law" includes "only the holdings of the Supreme Court, rather than its dicta." *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). Nevertheless, "the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart*, 503 F.3d at 493.

As previously noted, § 2254(d) provides that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits" unless the petitioner can satisfy the requirements of either § 2254(d)(1) or § 2254(d)(2). This provision, however, "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v. Richter*, 131 S.Ct. 770, 785 (2011). Instead, when a federal claim has been presented to a state court and the state court has denied relief, "it may be presumed that the state court adjudicated the claim on the merits." *Id.* at 784-85. Where such is the case, the Court must apply the deferential standard of review articulated above, rather than some other less deferential standard.

The presumption that the state court "adjudicated [a] claim on the merits" may be overcome only "when there is reason to think some other explanation for the state court's decision is more likely." *Id.* If this presumption is overcome, however, the Court reviews the matter de novo. *See Wiggins v. Smith*, 539 U.S. 510, 533-35 (2003) (reviewing habeas issue *de novo* where state courts had not reached the question); *see also, Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003) (recognizing that *Wiggins* established *de novo* standard of review for any claim that was not addressed by the state courts).

ANALYSIS

I. Hearsay Evidence Claim (Habeas Claim I)

As noted above, Michigan State Troopers Ben Seal and Chris Shoemaker both spoke with the victim in this case, Martha Cruz, at the outset of the investigation into Cruz's allegations against Petitioner. Petitioner argues that the trial court abused its discretion by permitting Troopers

Seal and Shoemaker to testify as to statements made to them by Martha Cruz during their investigation.

A petition for writ of habeas corpus "shall not be granted" unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). The petitioner properly exhausts his claims by "fairly presenting his federal claims to the state courts." *Jells v. Mitchell*, 538 F.3d 478, 488 (6th Cir. 2008) (citation omitted). The exhaustion requirement "is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Id.*

In his state court briefs, Petitioner argued that introduction of the testimony in question violated state law only. Petitioner made no reference, direct or inferential, that introduction of this testimony violated his rights under federal law. Thus, to the extent Petitioner asserts this claim as simply violating state law, such is not cognizable in this proceeding. *See* 28 U.S.C. § 2254. To the extent that Petitioner asserts in this Court that introduction of the testimony in question violates his rights under federal law, such has not been properly exhausted. Nevertheless, the Court possesses the authority to deny on the merits unexhausted claims asserted in a habeas petition. *See* 28 U.S.C. § 2254(b)(2) ("[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). Petitioner has not requested that the Court stay the present matter to further pursue this particular claim. Accordingly, the Court will address the merits of Petitioner's claim.

Generally, errors by a state court on matters involving the admission or exclusion of evidence are not cognizable in a federal habeas proceeding. *See Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Habeas relief is warranted, however, if the error "had substantial and injurious

effect or influence in determining the jury's verdict." *Clemmons v. Sowders*, 34 F.3d 352, 357 (6th Cir. 1994) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). This requires Petitioner to demonstrate "actual prejudice" resulting from a constitutional error. *Clemmons*, 34 F.3d at 357.

To establish constitutional error, Petitioner cannot simply argue that the trial court's evidentiary ruling was improper, as "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Rather, Petitioner must establish that his conviction violated the Constitution, laws, or treaties of the United States. *Id.* In this respect, it is recognized that "[w]hen an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief." *Bugh*, 329 F.3d at 512.

Fundamental fairness does not, however, "require a perfect trial," *Clemmons*, 34 F.3d at 358, and courts have defined those violations which violate fundamental fairness "very narrowly." *Bugh*, 329 F.3d at 512. State court evidentiary rulings do not offend due process unless they violate "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (citations omitted). Whether the admission of evidence constitutes a denial of fundamental fairness "turns upon whether the evidence is material in the sense of a crucial, critical highly significant factor." *Ege v. Yukins*, 485 F.3d 364, 375 (6th. Cir. 2007).

The Sixth Circuit has found that the improper introduction of evidence violated a criminal defendant's right to a fair trial where the challenged evidence was the only direct evidence linking the defendant to the crime. *See Ege*, 485 F.3d at 374-78. However, where there exists sufficient other evidence of guilt and the challenged evidence is only "peripheral to the case against" the defendant, the Sixth Circuit has found no due process violation. *Collier v. Lafler*, 2011 WL 1211465 at *3 (6th Cir., Mar. 30, 2011). The Troopers' testimony concerning statements made

to them by Martha Cruz was only peripheral to the case against Petitioner. Cruz herself testified and was subject to thorough cross-examination. Moreover, the DNA evidence presented at trial strongly supports Petitioner's guilt. Accordingly, this particular claim is rejected.

II. Opinion Testimony Claim (Habeas Claim II)

Petitioner next claims that the trial court erred by permitting Amber Jarnes to offer opinion testimony on the topics of sexual assault and penetration. While Petitioner presented this claim on direct appeal in the Michigan Court of Appeals, he did not present this claim to the Michigan Supreme Court. Accordingly, this claim has not been properly exhausted. The Court will nonetheless address the merits of this claim.

While the prosecution requested that Jarnes be permitted to testify as an expert in the area of sexual assault examinations, this request was denied by the trial court on the ground that Jarnes did not complete her certification as Sexual Assault Nurse Examiner until after she examined Martha Cruz. (Trial Transcript, October 19, 2010 at PageID.415-21). Jarnes instead limited her testimony to her examination of Cruz and her assessment and opinions as to what her examination revealed. Introduction of such testimony did not deprive Petitioner of a fundamentally fair trial. This argument is, therefore, rejected.

III. Fourth Amendment Claim (Habeas Claim III)

Petitioner asserts that he is entitled to relief because there did not exist probable cause to initiate criminal proceedings against him. Petitioner's claim that the state court lacked jurisdiction under state law to conduct his criminal trial is a matter of state law which is not

cognizable in a federal habeas corpus proceeding. *See Strunk v. Martin*, 27 Fed. Appx. 473, 475 (6th Cir., Nov. 6, 2001); *Milner v Hoffner*, 2017 WL 24793 at *10 (E.D. Mich., Jan. 3, 2017). Moreover, alleged deficiencies in the state's initial criminal proceedings are not cognizable in a federal habeas proceeding, as such alleged deficiencies do not undermine the validity of any subsequent conviction. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (the Court recognized "the established rule that illegal arrest or detention does not void a subsequent conviction"). Accordingly, this claim is rejected.

IV. Prosecutorial Misconduct Claims (Habeas Claim IV)

Finally, Petitioner argues that he is entitled to relief on the ground of prosecutorial misconduct. Specifically, Petitioner argues that the prosecuting attorney engaged in the following acts of misconduct: (1) failed to prove his opening statement; (2) misled the jury, (3) improperly bolstered the credibility of a witness; and (4) argued facts not in evidence.

When a petitioner makes a claim of prosecutorial misconduct, "the touchstone of due process analysis...is the fairness of the trial, not the culpability of the prosecutor." *Cockream v. Jones*, 382 Fed. Appx. 479, 484 (6th Cir., June 29, 2010) (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). The issue is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Gillard v. Mitchell*, 445 F.3d 883, 897 (6th Cir. 2006) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)); *see also*, *Givens v. Yukins*, 2000 WL 1828484 at *6 (6th Cir., Dec. 5, 2000) ("[t]he aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused") (quoting *Phillips*, 455 U.S. at 219). Thus, even if the challenged comments or actions

were improper, habeas relief is available only where such were "so flagrant as to render the entire trial fundamentally unfair." *Gillard*, 445 F.3d at 897.

When analyzing a claim of prosecutorial misconduct, the Court undertakes a two part analysis. The Court must first determine whether "the prosecutor's conduct and remarks were improper." *Girts v. Yanai*, 501 F.3d 743, 758-59 (6th Cir. 2007). If such is the case, the Court must then determine "whether the impropriety was flagrant and thus warrants reversal." *Id.* at 759. When assessing whether an improper comment or action resulted in a denial of the right to a fair trial, the Court considers the following factors: (1) the likelihood that the comments or conduct mislead the jury or prejudiced the accused; (2) whether the comments or actions were extensive or isolated; (3) whether the comments or actions were deliberately or accidentally presented to the jury; and (4) whether the evidence against the accused was substantial. *Id.*

A. Opening Statement and Misleading the Jury

In his opening statement, the prosecuting attorney highlighted the role that DNA evidence would play in Petitioner's prosecution. Specifically, the prosecutor stated that, ". . .it comes down to Gomez's seminal fluid being mixed in with the vaginal fluid of his twelve-year-old stepdaughter and leaving a stain on the bedspread of his stepdaughter's bedspread in her bedroom." (Trial Transcript, October 19, 2010 at PageID.324). The prosecutor later stated that, ". . .they come up with DNA of the defendant's seminal fluid and the victim's vaginal fluid mixed together. . ." (Trial Transcript, October 19, 2010 at PageID.328). Petitioner argues that he is entitled to relief because Lisa Champion subsequently testified that "there's nothing to test for like vaginal secretions or anything like that." (Trial Transcript, October 20, 2010 at PageID.496). According to Petitioner,

Champion's testimony refutes the prosecutor's opening statement and rendered his trial unfair. Petitioner further argues that the prosecutor improperly mislead the jury by eliciting from Ann Hunt testimony that the biological material in these mixed stains was "likely to be a secretion from the body," possibly a "vaginal stain." (Trial Transcript, October 20, 2010 at PageID.530).

Petitioner's arguments are based upon a mischaracterization and selective reading of the trial testimony. As described above, Ann Hunt testified that the bedding submitted for DNA testing contained "mixed stains" containing genetic material from both Petitioner and Martha Cruz. Testing further excluded Natalie Gomez as a donor of the DNA discovered in these mixed stains. Thus, the evidence established that the bedding contained stains comprised of biological material from both Petitioner and Martha Cruz. The opening statements with which Petitioner disagrees constitute nothing more than reasonable inferences from the evidence and, as such, do not violate Petitioner's rights. *See, e.g., Davis v. Johnson*, - - - Fed. Appx. - - -, 2016 WL 5076038 at *3 (6th Cir., Sept. 20, 2016) (recognizing that prosecutors "must be given leeway to argue reasonable inferences from the evidence"). To the extent that the mixed stains on the bedding could have been produced in some way other than Petitioner and his step-daughter engaging in sexual activity, such was a matter which Petitioner was able to explore on cross-examination and argue to the jury. That the jury was unpersuaded by any such alternative theories is not a basis for overturning Petitioner's conviction. The Michigan Court of Appeals rejected this argument thusly:

> Defendant claims that references to the presence of the victim's vaginal fluid mixed with defendant's seminal fluid on the bedspread in the prosecutor's opening statement, in his questions to witnesses, and his closing argument constituted misconduct because defendant maintains that the evidence in this case does not support the argument that the victim's vaginal fluid was detected on the bedspread and that it was mixed with defendant's seminal fluid.

> In regard to the argument about the victim's vaginal fluid, defendant correctly points out that the experts testified that there is no test that specifically identifies a bodily fluid stain as vaginal fluid. However, defendant's argument ignores the fact that the DNA expert explained that it was possible, and even likely, that the stain was from vaginal secretions. Additionally, the victim specifically testified to sexual intercourse with defendant on the bedspread from which the stain that was analyzed for DNA was collected. Thus, the prosecution's argument that the victim's DNA on the stain was the victim's vaginal fluid constituted a proper argument based on a reasonable inference that could arise from the evidence.
>
> Similarly, in regard to the "mixed" nature of the stain, defendant correctly argues that the expert testified that she could not tell if the two stains were deposited on the bedspread at the same time. However, the expert did used the term "mixed stain" several times, and referenced the "mixed" nature of the sample several times, including stating that she found "a mixture that was consistent with" the victim's DNA and defendant's DNA. The prosecution specifically asked the expert whether the stain had two separate DNA donors, and she testified that yes, the stain had two separate donors.
>
> Moreover, defense counsel asked the expert whether there is any way to determine how long the DNA was present on the bedspread, and she explained that the DNA would remain until the item is washed, and that there is some degradation of DNA over time based on the conditions it is subject to such as high heat and humidity. The prosecution asked the expert whether the DNA samples analyzed in this case were in any way degraded, and she testified that the samples were not degraded and she obtained a full profile. Accordingly, based on the testimony regarding the DNA evidence in combination with the victim's testimony, we conclude that the prosecution's arguments regarding the victim's vaginal fluid and the mixed nature of the stain were supported by the evidence because those arguments were based on reasonable inferences that may arise from the evidence. Thus, defendant has failed to demonstrate plain error affecting his substantial rights in connection with the alleged prosecutorial misconduct involving the prosecution's opening statement, closing argument, and alleged misleading of the jury.

People v. Gomez, Case No. 301706, Opinion at 7-8 (Mich. Ct. App., Sept. 20, 2012).

In light of the authority and evidence identified above, the Court concludes that this

determination is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Furthermore, this decision was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, this claim raises no issue upon which habeas relief may be granted.

B. Bolstering Witness' Credibility

During the prosecution's examination of Dr. James Henry, the following exchange occurred:

> Q: Hypothetically speaking, Doctor Henry, if a child, a twelve-year-old child has been sexually abused by her stepfather, and there finally came a disclosure, the stepfather is removed from the home, the child remains in the home with the mother, and the mother on a daily basis is telling her, "I don't believe you, you're lying, why are you doing this," would that have any impact on a child and cause her to recant?
>
> A: Absolutely.

(Trial Transcript, October 20, 2010 at PageID.464).

Petitioner argues that this exchange constitutes an attempt by the prosecutor to improperly bolster the testimony of Martha Cruz. It is well established that a prosecutor "may not express a personal opinion concerning the credibility of a trial witness because to do so exceeds the legitimate advocate's role by improperly inviting the jury to convict on a basis other than a neutral independent assessment of the record proof." *United States v. Owens*, 426 F.3d 800, 806 (6th Cir. 2005) (citations omitted). Likewise, it is improper for a lay witness or an expert witness to offer an opinion vouching for the credibility of another witness. *See, e.g., Engesser v. Dooley*, 457 F.3d 731, 736 (8th Cir. 2006); *United States v. New*, 491 F.3d 369, 378 (8th Cir. 2007); *Maurer v. Department*

of Corrections, 32 F.3d 1286, 1289 (8th Cir. 1994).

Dr. Henry did not vouch for Martha Cruz's credibility or otherwise comment whether he found her testimony worthy of belief. Instead, he was asked a hypothetical question designed to elicit whether there might be reasons, other than initial prevarication, that would explain a decision by an alleged victim of sexual assault to recant, if only temporarily, her allegations. The Michigan Court of Appeals rejected this particular claim, concluding as follows:

> the hypothetical posed to the expert was properly designed to explain the victim's specific behavior, her recantation in this case, that might be incorrectly construed by the jury as inconsistent with actual abuse. A jury might reasonably believe that recantation by a victim would not occur unless the victim was originally fabricating the sexual abuse; therefore, the expert testimony was required to demonstrate to the jury that victims of sexual abuse may recant their allegations for several reasons.

People v. Gomez, Case No. 301706, Opinion at 8 (Mich. Ct. App., Sept. 20, 2012).

In light of the authority and evidence identified above, the Court concludes that this determination is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Furthermore, this decision was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, this claim raises no issue upon which habeas relief may be granted.

C. Arguing Facts not in Evidence

In his closing argument, the prosecutor argued, "that's [Petitioner's] seminal fluid on Martha [Cruz's] bedspread with her vaginal fluid, and I say vaginal fluid and I say it very deliberately because you get to consider all of the evidence, all of the evidence as a whole." (Trial Transcript, October 21, 2010 at PageID.670). The Prosecutor, in describing Ann Hunt's testimony,

stated:

> And the other thing that she testified to is that this is a mixture of those two, a mixture. It's not one stain that has been deposited in that area, dried, and a second stain put on top of it. It's a mixture of the two fluids as they dried together.

(Trial Transcript, October 21, 2010 at PageID.671).

Petitioner argues that these statements constitute by the prosecutor an argument based upon facts not in evidence. The Court disagrees. As discussed above, Ann Hunt testified that the bedding submitted for DNA testing contained "mixed stains" containing genetic material from both Petitioner and Martha Cruz. Hunt further testified that the biological material in these mixed stains was "likely to be a secretion from the body," possibly a "vaginal stain." Thus, the prosecutor's argument was based on inferences which could reasonably be drawn from the evidence. As previously noted, such constitutes permissible argument.

As previously noted, the Michigan Court of Appeals rejected this claim. In light of the authority and evidence identified above, the Court concludes that this determination is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Furthermore, this decision was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, this claim raises no issue upon which habeas relief may be granted.

CONCLUSION

For the reasons articulated herein, the undersigned concludes that Petitioner is not being confined in violation of the laws, Constitution, or treaties of the United States. Accordingly, the undersigned recommends that Gomez's petition for writ of habeas corpus be **denied**. The undersigned further recommends that a certificate of appealability be denied. *See Slack v. McDaniel*, 529 U.S. 473 (2000).

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within 14 days of the date of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

Date: March 9, 2017

/s/ Ellen S. Carmody
ELLEN S. CARMODY
United States Magistrate Judge

Document:People v. Gomez, 2013 Mich. LEXIS 711

People v. Gomez, 2013 Mich. LEXIS 711

Supreme Court of Michigan

May 22, 2013, Decided

SC: 146235

Reporter

2013 Mich. LEXIS 711 * | 494 Mich. 851 | 830 N.W.2d 137 | 2013 WL 2256223

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOEL ALEXZANDER GOMEZ, Defendant-Appellant.

Subsequent History: Reconsideration denied by, Motion denied by People v. Gomez, 495 Mich. 855, 835 N.W.2d 579, 2013 Mich. LEXIS 1304 (Sept. 3, 2013)

Prior History: **[*1]** COA: 301706. Cass CC: 09-010252-FC.

People v. Gomez, 2012 Mich. App. LEXIS 1806 (Mich. Ct. App., Sept. 20, 2012)

Judges: Robert P. Young, Jr., Chief Justice. Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Justices. CAVANAGH, J., would grant leave to appeal.

Opinion

Order

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL ALEXZANDER GOMEZ,

Defendant-Appellant.

UNPUBLISHED
September 20, 2012

No. 301706
Cass Circuit Court
LC No. 09-010252-FC

Before: KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of ten counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b) (victim less than 13 years old), and one count of domestic assault, MCL 750.81a(2). Defendant was sentenced to concurrent terms of 25 to 40 years' imprisonment for each of the ten first-degree criminal sexual conduct convictions. Defendant was not sentenced to any term of imprisonment for his misdemeanor domestic assault conviction. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

Defendant's convictions arise from his repeated sexual abuse of his step-daughter. The victim was ten-years-old when the sexual abuse began in 2007. The victim did not report defendant's conduct until March of 2009, after defendant and her mother confronted her about a note from her boyfriend. Defendant discovered the note while working with the victim at the family's restaurant. After reading the note, defendant became angry with the victim and choked her and slapped her in the face with his hand. The victim revealed the sexual abuse to her mother after her mother asked her if she was still a virgin in response to the note.

Defendant and the victim's mother took the victim to speak with her pastor after the victim accused defendant of sexual abuse. The pastor suggested that the victim's mother and defendant contact the authorities, and the victim was taken to the police department where she reported the sexual abuse to Troopers Ben Seal and Chris Shoemaker. The victim explained that defendant first approached her when she was 10-years-old and sleeping on the couch. She testified that defendant pulled down his pants, took her pants off, and attempted penile-vaginal penetration. Defendant was unsuccessful and stopped when the victim told him that it hurt. Defendant attempted penile-vaginal penetration one more time unsuccessfully, and after that was able to completely penetrate the victim's vagina with his penis. The victim testified that forced

penile-vaginal intercourse continuously occurred a couple times a week. The victim described defendant ejaculating, and explained that he sometimes ejaculated onto her bedspread or other blankets. The victim testified that defendant would force her to have intercourse with him at the family's restaurant, on the couch, and in her bedroom. During the trial, Troopers Seal and Shoemaker both testified pursuant to MCL 768.27c about the statements the victim made at the police station. Defendant objected to the troopers' testimony.

Defendant left the family home after the victim's allegations, and the victim remained with her mother and siblings. During this time, the victim was examined by a psychologist, and by a nurse trained in conducting sexual assault examinations. After interviewing the victim, police collected several items from the victim's home for DNA analysis. After the results of the analysis showed defendant's sperm cells and the victim's DNA present on the victim's bedspread consistent with the victim's statement that defendant sometimes ejaculated onto the bedspread, defendant was arrested. During the time that the victim remained in her home with her mother, the victim's mother frequently indicated that she did not believe the victim was being truthful. Eventually the victim recanted her allegations to several people, apologized for her actions at church, and wrote a letter recanting her allegations. However, at trial the victim testified about the sexual abuse and stated that her recantation was false and was made only because she felt like no one believed she was telling the truth.

II. HEARSAY

On appeal, defendant argues that the trial court abused its discretion when it permitted Troopers Seal and Shoemaker to testify pursuant to MCL 768.27c about the statements the victim made to them regarding the sexual abuse. Specifically, defendant maintains that this testimony was not properly admissible because the fact that the victim had a motive for fabricating the statements that she made to the troopers required that the testimony be excluded as untrustworthy pursuant to MCL 768.27c(2)(d).

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Meissner*, 294 Mich App 438, 444-445; 812 NW2d 37 (2011). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Issues of statutory interpretation are subject to de novo review. *Meissner*, 294 Mich App at 444.

The Legislature "enacted MCL 768.27c as a substantive rule of evidence reflecting specific policy concerns about hearsay in domestic violence cases." *Id.* at 445. By enacting the statute, the Legislature determined that statements made to law enforcement officers are admissible in domestic violence cases under certain enumerated circumstances. *Id.* MCL 768.27c provides:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

Defendant contests only the trial court's finding that the requirement that the statement was made under circumstances that would indicate the statement's trustworthiness as set forth in MCL 768.27c(1)(d) was satisfied. Defendant specifically relies on MCL 768.27c(2)(b), which provides that a court should consider whether the declarant had any bias or motive to fabricate when determining whether the statement was made under circumstances indicating its trustworthiness. Defendant argues that because the victim admitted that she was in trouble for having a note from a boy, she was biased and had a motive to fabricate the rape allegations. Defendant supports his argument with the fact that the victim also testified that she told the psychologist she met with after she recanted that she accused defendant of sexual abuse because she was mad at defendant and did not want to get in trouble for the note. No other evidence in this case would support finding that the victim fabricated the charges against defendant.

MCL 768.27c(2) provides guidance to trial courts for determining whether a statement was made under circumstances that would indicate the statement's trustworthiness. Subsection (2) provides that

circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

When explaining its decision to admit this evidence, the trial court specifically addressed each factor set forth in subsection (2). In regard to subsection (2)(b), the trial court stated that it was "satisfied that, again, the bias or motive for fabrication is slight, if any." This is the finding with which defendant specifically takes issue. Defendant maintains that the victim's bias or motive for fabrication was significant enough to require a finding that her statements lacked trustworthiness.

We note initially that subsection (2) does not require excluding statements made to police officers in domestic violence cases merely because there is evidence of bias or motive to fabricate the statement. The evidence is merely relevant to the determination of whether the statement is trustworthy. Further, subpart (b) directs that in addition to whether there is evidence of bias or motive for fabrication, courts should assess the extent of any bias or motive. See *Meissner*, 294 Mich App at 449.

Here, the trial court found "the bias or motive for fabrication is slight, if any." From this statement, it appears that the trial court was cognizant of the evidence of fabrication, but found the extent of the evidence to be minimal. Although arguably the impact of the evidence of fabrication on the determination of trustworthiness of the statements made by the victim to the troopers is a close question, this decision is one addressed to the discretion of the trial court, and we conclude that the trial court's decision to admit the evidence was within the range of principled outcomes.[1]

III. EXPERT TESTIMONY

Defendant argues that the trial court abused its discretion when it permitted Amber Jarnes, the registered nurse who examined the victim, to offer opinion testimony about whether the results of the medical examination were consistent with sexual penetration of the victim.

We review a trial court's decision to admit or exclude evidence, including expert testimony, for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). We also review the trial court's determination regarding whether a witness qualifies as an expert for an abuse of discretion. *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Blackston*, 481 Mich at 460. A trial court abuses its discretion when it permits the introduction of evidence that is inadmissible as a matter of law. *Dobek*, 274 Mich App at 93. Issues of law, including the interpretation of the Michigan Rules of Evidence, are reviewed de novo. *Id.* "An error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party." *Id.*

MRE 702 governs the admission of expert testimony, and 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

[1] We need not address defendant's second argument that the victim's statements did not satisfy the excited utterance hearsay exception in light of our conclusion that the statements were properly admitted pursuant to MCL 768.27c.

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"The trial court has an obligation under MRE 702 'to ensure that any expert testimony admitted at trial is reliable.'" *Dobek*, 274 Mich App at 94, quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). "An individual must be qualified by 'knowledge, skill, experience, training, or education' to testify as an expert witness." *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995), quoting MRE 702. See also *Whitfield*, 425 Mich at 122. , "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy data." *Dobek*, 274 Mich App at 94.

Jarnes testified that she was currently employed as a Sexual Assault Nurse Examiner (SANE) nurse at Lakeland Hospital, and she completed the SANE training course in November 2008, and thereafter completed 40 hours of clinical training under a SANE certified nurse. After completing the course and the clinical training, Jarnes was qualified to perform SANE examinations. Jarnes became a certified SANE nurse in October 2009. Jarnes examined the victim in this case in April 2009, before she was a certified SANE nurse, but after she was qualified to practice as a SANE nurse. Jarnes testified that certification is optional, and not required for practice as a SANE nurse.

Defendant objected to the qualification of Jarnes as a SANE expert, and the trial court sustained the objection, stating: "The objection is sustained, the court is not going to certify her as an expert without the licensing required. That doesn't mean you can't elicit testimony from her. I'm just not going to brand her an expert based on that deficiency." The prosecution asked Jarnes if the findings of her examination were unusual in any way for a child of 12-years-old, and defense counsel objected. Defense counsel maintained that because Jarnes was not qualified as an expert, she could testify only to her observations and not to her interpretation. The trial court asked the prosecution to lay more foundation in regard to what Jarnes's status as a registered nurse qualified her to discuss, and after inspecting her curriculum vitae, the trial court noted that as a licensed registered nurse Jarnes was qualified to answer the question. Jarnes stated that the "irregular pattern of linear tissue" was in the "area where the majority of injuries from penetration are found." Defense counsel again objected, and the prosecution moved to qualify Jarnes as an expert in the area of registered nursing. The trial court granted the prosecution's motion and qualified Jarnes as an expert in nursing.

The prosecution asked Jarnes about the injuries consistent with sexual penetration, and defense counsel objected. The trial court sustained the objection "pending further foundation that [Jarnes] has the training to qualify her to give opinion testimony on sexual penetration." The prosecution asked Jarnes several questions regarding her background and training. The prosecution then asked Jarnes: "So in this case what did you see that indicated that there was some type of penetration?" Defense counsel objected to the discussion of evidence of penetration, and the trial court stated that the "objection is overruled. The court has determined she does have sufficient training and experience and has been qualified as a registered nurse. It's up to the jury to determine what weight to give that opinion, and you can cross-examine her as to her qualifications." Jarnes was then permitted to testify about her findings that were consistent with some type of sexual penetration, including the raised white granular tissue and the irregular

linear pattern both present in areas where injuries from sexual penetration occur. On re-direct the prosecution asked Jarnes: "Bottom line, what you found in [the victim's] vaginal area, is that consistent with sexual penetration?" Jarnes said yes, and defense counsel objected because Jarnes "hasn't been sufficiently qualified to testify as an expert in that area." The trial court stated that the "objection is sustained and the last answer is struck. The jury is instructed to disregard that last answer."

Based on the evidence of Jarnes's qualifications, knowledge, and experience, we conclude that the trial court did not abuse its discretion by allowing Jarnes to testify about the results of her examination. It was not disputed that although she was not certified, Jarnes was already practicing as a SANE nurse at the time she examined the victim, and that she had completed her training as a SANE nurse before examining the victim. Accordingly, Jarnes's knowledge, education, training, and experience supported the trial court's conclusion to qualify her as an expert capable of testifying about the injuries sustained by the victim and the fact that the injuries were located on an area of the body where victims of sexual abuse are often injured. MRE 702.

IV. ISSUES RAISED IN DEFENDANT'S STANDARD 4 BRIEF

In his Standard 4 Brief, defendant first argues that the trial court did not have subject-matter jurisdiction over this case because the arrest warrant and complaint in this case "lack[ed] any indicia of probable cause for the court to initiate proceedings on."

While defendant did not raise a challenge based on jurisdiction in the trial court, a party may challenge the subject-matter jurisdiction of a court at any time. See *People v Gonzalez*, 256 Mich App 212, 234; 663 NW2d 499 (2003). Whether the trial court had subject-matter jurisdiction is a question of law that we review de novo. *Id.* at 234.

In Michigan, charges may be brought by a prosecutor either by information or indictment. MCR 6.112(B). The district court acquires jurisdiction over felony charges under either charging mechanism. MCL 767.1; MCR 6.112(B). The lower court record contains a Felony Information stamped as filed on October 8, 2009. Accordingly, the trial court in this case acquired subject-matter jurisdiction over defendant's felony charges when the prosecutor filed the Felony Information. Moreover, this Court has held that once the trial court obtains jurisdiction over defendant, "proof of an invalid arrest warrant does not divest the court of jurisdiction." *People v Hernandez*, 41 Mich App 594, 598; 200 NW2d 447 (1972). Thus, even if defendant's arrest warrant was invalid, the trial court still had subject-matter jurisdiction.[2]

[2] Nevertheless, we note that defendant's arrest warrant complies with MCR 6.102(C), which sets forth the required contents of an arrest warrant, including the accused's name, a description of the charged offense, and a command for a peace officer to bring the accused before a judicial officer of the judicial district. The court rule also requires the arrest warrant to be signed by the court. The arrest warrant in this case was in full compliance with the court rule. Defendant

Defendant also alleges that several instances of prosecutorial misconduct require reversal of his convictions and sentences.

This Court typically reviews alleged prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In this case, defendant failed to object to any of the alleged instances of prosecutorial misconduct in the trial court. Accordingly, we review the alleged errors for plain error affecting defendant's substantial rights. *Id.* "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* If a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *Id.* at 329-330.

When reviewing a claim of prosecutorial misconduct, we consider the pertinent portion of the lower court record in order to evaluate the prosecutor's remarks in context. *Id.* at 330. Analysis of alleged prosecutorial misconduct is fact specific. *Id.* "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Id.*

Defendant claims that references to the presence of the victim's vaginal fluid mixed with defendant's seminal fluid on the bedspread in the prosecutor's opening statement, in his questions to witnesses, and his closing argument constituted misconduct because defendant maintains that the evidence in this case does not support the argument that the victim's vaginal fluid was detected on the bedspread and that it was mixed with defendant's seminal fluid.

In regard to the argument about the victim's vaginal fluid, defendant correctly points out that the experts testified that there is no test that specifically identifies a bodily fluid stain as vaginal fluid. However, defendant's argument ignores the fact that the DNA expert explained that it was possible, and even likely, that the stain was from vaginal secretions. Additionally, the victim specifically testified to sexual intercourse with defendant on the bedspread from which the stain that was analyzed for DNA was collected. Thus, the prosecution's argument that the victim's DNA on the stain was the victim's vaginal fluid constituted a proper argument based on a reasonable inference that could arise from the evidence. *Id.*

Similarly, in regard to the "mixed" nature of the stain, defendant correctly argues that the expert testified that she could not tell if the two stains were deposited on the bedspread at the same time. However, the expert did used the term "mixed stain" several times, and referenced the "mixed" nature of the sample several times, including stating that she found "a mixture that was consistent with" the victim's DNA and defendant's DNA. The prosecution specifically

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argues that the warrant was invalid in part because it failed to list the complainant's name; however, MCR 6.102(C) does not require inclusion of the complainant's name on the warrant.

asked the expert whether the stain had two separate DNA donors, and she testified that yes, the stain had two separate donors.

Moreover, defense counsel asked the expert whether there is any way to determine how long the DNA was present on the bedspread, and she explained that the DNA would remain until the item is washed, and that there is some degradation of DNA over time based on the conditions it is subject to such as high heat and humidity. The prosecution asked the expert whether the DNA samples analyzed in this case were in any way degraded, and she testified that the samples were not degraded and she obtained a full profile. Accordingly, based on the testimony regarding the DNA evidence in combination with the victim's testimony, we conclude that the prosecution's arguments regarding the victim's vaginal fluid and the mixed nature of the stain were supported by the evidence because those arguments were based on reasonable inferences that may arise from the evidence. *Id.* Thus, defendant has failed to demonstrate plain error affecting his substantial rights in connection with the alleged prosecutorial misconduct involving the prosecution's opening statement, closing argument, and alleged misleading of the jury.

Defendant also argues that the prosecution committed misconduct by bolstering the credibility of the victim through improper questioning of James Henry, Ph.D, an expert in child sexual abuse. Specifically, defendant takes issue with the prosecutor's question: "hypothetically speaking, if a mother who has been telling a 12-year-old girl who has been sexually abused that she's lying, doesn't believe her, and then makes her write that letter of recantation, would that have an impact on her?" Henry answered "absolutely," and explained that such behavior by the mother makes a victim feel powerless, and causes the victim to feel like recantation is required to maintain her mother's love.

Expert testimony in child sexual abuse cases is directed by the Michigan Supreme Court's holding in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), further explained in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). In *Peterson*, the Court reaffirmed its holding in *Beckley* that an expert may not testify that the sexual abuse occurred, that an expert may not vouch for the credibility of the victim, and that an expert may not testify regarding the guilt of the defendant. *Id.* at 352. The Court explained that an expert "may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim." *Id.*

Applying the guidelines for expert testimony in child sexual abuse cases set forth in *Peterson* to the circumstances in this case, we conclude that the hypothetical posed to the expert was properly designed to explain the victim's specific behavior, her recantation in this case, that might be incorrectly construed by the jury as inconsistent with actual abuse. A jury might reasonably believe that recantation by a victim would not occur unless the victim was originally fabricating the sexual abuse; therefore, the expert testimony was required to demonstrate to the jury that victims of sexual abuse may recant their allegations for several reasons. Thus, the expert testimony in this case was proper under *Peterson's* guidelines. *Id.* Accordingly,

defendant has failed to demonstrate that the prosecutor's hypothetical question constituted plain error affecting his substantial rights.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens