Appendix A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY RICARDO WIMBERLY,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 342751
Calhoun Circuit Court
LC No. 2017-001453-FC

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant Jeffrey Ricardo Wimberly appeals by right his jury convictions of two counts of first-degree criminal sexual conduct involving force and the aid of an accomplice (CSC-I), MCL 750.520b(1)(d)(*ii*). The trial court sentenced Wimberly as a second-offense habitual offender, MCL 769.10, to serve 39 to 60 years in prison for each conviction, ordering him to serve those sentences consecutively. On appeal, Wimberly argues that the trial court should have dismissed the charges against him on the basis of a due process violation for a prejudicial prearrest delay. He also maintains that he did not have a fair trial as a result of his trial counsel's defective performance, evidentiary errors, and the prosecutor's misconduct. Finally, Wimberly contends that the trial court erred when imposing sentence. For the reasons explained below, we hold that there were no errors warranting reversal of his convictions; however, Wimberly is entitled to a remand for resentencing under *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019).

I. BASIC FACTS

The jury convicted Wimberly on the basis of evidence that he forcibly sexually penetrated the victim, AP, in May 2002. AP testified that she was 17 years old at the time and that she knew Wimberly from an art class they had together in high school. AP admitted that she was not a good kid growing up. She testified that she had acquired a gun and arranged to meet Wimberly to sell it to him.

On the night at issue, Wimberly arrived at AP's house in a car driven by Wimberly's cousin, Larry Martin. AP claimed that Wimberly came into her home and that they discussed a price for the gun. After she put the gun away, AP agreed to ride with Wimberly to get money so

that he could purchase the firearm. AP testified that Martin drove the car a few blocks and then stopped. According to AP, who was in the backseat, Wimberly then climbed into the backseat from the front passenger seat and forcibly raped her while Martin held her arms. She stated that Wimberly choked her and threatened to kill her throughout the ordeal. AP somehow escaped from the car and ran through the neighborhood. A family friend, her brother, and her mother, all of whom encountered AP shortly after the sexual assault, testified that AP was frantic, hysterical, and crying and that she asserted that she had been raped. After informing her mother of the incident, AP's mother called the police, and officers and an ambulance soon arrived at their home.

AP told the first responders that she had been raped in a car, but she denied knowing who had attacked her. Instead, she described the perpetrators as two unknown African-American men who had offered to give her a ride. A few days later, AP identified Wimberly and Martin as her assailants to her mother, and her mother reported the information to a police officer. Although AP had submitted to a sexual assault examination on the night of the assault, the evidence from that examination did not get processed, and the police department did no further investigation until 2016. The sexual assault examination did reveal trauma to AP's vaginal area.

In 2016, the Battle Creek Police Department reviewed its untested sexual assault kits and discovered almost 200 untested kits in storage, which included the evidence taken from AP in 2002. The police department sent in AP's kit for processing, and DNA evidence confirmed that Wimberly contributed semen found in AP's vagina and anus. Investigators reopened AP's case and arrested Wimberly for the sexual assault. When questioned by a police investigator, Wimberly denied ever having sex with AP. But after he was confronted with the DNA evidence, Wimberly stopped the interview and asked the investigator to erase the recording of the interview so that he could make a new statement. The investigator declined to erase the recording; Wimberly requested an attorney, and the interview ended.

The prosecution charged Wimberly with four counts of CSC-I; it alleged one count of penile-vaginal penetration, one count of digital-vaginal penetration, one count of penile-anal penetration, and one count of digital-anal penetration. Wimberly testified in his defense and, contrary to his statement to the police, contended that he had been in a longstanding, consensual sexual relationship with AP and that the sexual incident at issue was consensual. The jury rejected Wimberly's version of events and convicted him of the CSC-I counts involving penile penetration. The jury, however, acquitted him of the charged digital penetrations.

The trial court sentenced Wimberly as already noted, and he now appeals by right.

II. PREARREST DELAY

Wimberly first argues that he was denied due process when the trial court rejected his motion to dismiss the charges on the basis of prejudicial prearrest delay. Wimberly claims prejudice because AP's father and a person who had encountered AP shortly after the alleged rape had died. Wimberly also states that AP referenced a detailed letter that she wrote to her father shortly after the incident that was now missing. Wimberly speculates that the witnesses and the letter may have benefited or exculpated him, while acknowledging that "[i]t is of course unknown what the testimony . . . would have been or what was the content of the letter from [AP] to her father." Wimberly further asserts prejudice because the incident occurred near a police substation

that no longer exists and the substation likely had surveillance cameras back in 2002 and was likely staffed 24 hours a day at the time. He argues that "[i]f a surveillance video from the police substation showed that no car was parked within range of the surveillance camera that matched the description of the car in which [AP] said the incident took place, this could have affected the outcome of the trial." Finally, Wimberly contends that he was prejudiced because AP "had serious memory problems during the trial, although she claimed that it was not the passage of time but the event itself that caused her to not remember details of the incident." Wimberly closes his argument by stating that "[t]here is no reason to believe that the Calhoun County Prosecutor delayed the case for tactical advantage."

Although we review for an abuse of discretion a trial court's ruling on a motion to dismiss, *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998), this Court reviews de novo the issue whether a delay in charging a defendant violated his or her due process rights, *People v Reid (On Remand)*, 292 Mich App 508, 511; 810 NW2d 391 (2011). "Before dismissal may be granted because of prearrest delay there must be *actual and substantial prejudice* to the defendant's right to a fair trial *and an intent by the prosecution to gain a tactical advantage*." *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009) (quotation marks and citation omitted; emphasis added); see also *United States v Marion*, 404 US 307, 324; 92 S Ct 455; 30 L Ed 2d 468 (1971) ("Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."); *People v Woolfolk*, 304 Mich App 450, 454; 848 NW2d 169 (2014) ("A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantage violates the constitutional right to due process."); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). A defendant "must present evidence of actual and substantial prejudice, not mere speculation." *Woolfolk*, 304 Mich App at 454. "A defendant cannot merely speculate generally that any delay resulted in lost memories, witnesses, and evidence, even if the delay was an especially long one[.]" *Id.* (citations omitted). Mere delay between the time that an offense is committed and the time of arrest does not constitute a denial of due process because there is no constitutional right to be arrested. *Patton*, 285 Mich App at 236.

First, Wimberly effectively concedes that there was no intent by the state to gain a tactical advantage by delaying his arrest, and there is nothing in the record to show or suggest such an intent or effort. If anything, it appears that it was simply police negligence that led to the delay. For this reason alone, Wimberly's argument fails. Moreover, with respect to the issue of actual and substantial prejudice, Wimberly's own argument, as set forth and quoted above, is nothing but speculation and conjecture. It lacks a single assertion of *actual* prejudice, let alone *substantial* prejudice. Accordingly, we reject Wimberly's argument of a due process violation; therefore, the trial court did not err by denying Wimberly's motion to dismiss based on prearrest delay.

III. EXPERT TESTIMONY

Wimberly next argues that the trial court abused its discretion and denied him a fair trial when it allowed a sexual assault nurse examiner (SANE), Phyllis Van Order, to testify on certain

matters. SANE Van Order did not conduct the actual examination of AP but was the supervisor of the SANE who did perform the examination. Van Order reviewed the SANE's report and four photographs relative to the examination that were admitted into evidence. Wimberly posits that Van Order testified that the photographs showed injuries that were consistent with nonconsensual intercourse and consistent with a victim sitting in the backseat of a car when the injuries occurred. Beyond recitation of the law and some background facts, the full argument made by Wimberly is as follows:

> The problem with this testimony is that Ms. Van Order gave absolutely no basis for these conclusions except for her own experience in examining people who made a claim of sexual assault and taking a history from them. She did not make reference to any studies outside of her own experience. Ms. Van Order said that she had observed the kinds of injuries shown in the photographs in a "handful" of cases out of the 1,700 cases where she had conducted a SANE examination. But she had no way of knowing, except from patient histories, whether those injuries resulted from consensual intercourse, sexual assault or other causes. Statistical studies showing a difference between injuries sustained by people claiming consensual sex and those sustained by people claiming non-consensual sex would minimize whether the patients were telling the truth as a factor. This is even more true for Ms. Van Order's claim that the injuries shown in the photographs were consistent with a victim sitting in the back seat of a car. Ms. Van Order did not even attempt to relate this to her clinical experience. Although this is not vouching for the accuracy of [AP's] account, it unfairly bolstered that account with no real basis in fact.

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). A trial court necessarily abuses its discretion when it makes an error of law. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). 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.

Evidence of the use of force or coercion is relevant where a defendant claims that sexual penetration was consensual, and an expert's opinion on forcible penetration is admissible if based on physical objective evidence as identified in an examination of the victim. *People v Smith*, 425 Mich 98, 114-115; 387 NW2d 814 (1986). In *People v Thorpe*, 504 Mich 230, 255; 934 NW2d 693 (2019), our Supreme Court observed:

> [A]n examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the conclusion is nothing more than the doctor's opinion that the victim had told the truth. An examining physician's opinion is objectionable when it is solely based on what the victim told the physician. Such testimony is not permissible because a jury is in just as good a position to evaluate the victim's testimony as the doctor. Nonetheless, an examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history. [Quotation marks, citations, alterations, and ellipses omitted.]

Van Order testified that the injury pattern evidence was consistent with the description that AP provided as to her position in the backseat of the car. Van Order also testified that AP's injuries were consistent with a forced genital penetration by a penis or a finger. Van Order acknowledged that she could not say that the injuries were the result of a rape. With respect to Van Order's testimony, Wimberly's argument appears to be that the opinion testimony was inadmissible because it was based on Van Order's personal experiences conducting sexual assault examinations in conjunction with the personal histories that Van Order took from the patients that she was examining who claimed victimization in sexual assaults. Wimberly is apparently claiming that Van Order's opinions on the types of injuries that reveal forced penetration are ultimately premised on victims' assertions of unconsented to sexual penetration without reference to independent studies, rendering Van Order's opinions problematic.[1] We examine more closely Van Order's testimony.

SANE Van Order identified a "laceration with abrasion" to an area between AP's labia minora and labia majora, which Van Order characterized as caused by blunt force trauma. She identified another area as showing a more "diffuse" pattern of blunt force trauma. Van Order testified that blunt-force trauma injuries of the nature described are typically caused when an "object impacts another object" and the object that "receives the force does not have the capacity to accommodate the force, and so there's tearing or abrading or rubbing away of . . . cells in the tissue." Van Order explained to the jury that she had observed women with injuries comparable to those suffered by AP and that those women described "quite a bit of pain" and had difficulty walking or finding a comfortable seated position. Van Order testified that despite having performed more than 1,700 examinations, she had only seen such injuries a "handful of times." She indicated that the women who had similar injuries each reported that the injuries resulted when an actor attempted to insert his penis into the patient's vagina, and the woman "reflexively adjusted to avoid that." Van Order agreed that the women had each claimed unconsented-to sexual intercourse. After describing the injuries and her experience with patients who had similar injuries, Van Order opined, as noted above, that AP's injury pattern was consistent with AP's description of her location in the car's backseat and her resisting penetration. Also, as indicated earlier, Van

[1] Wimberly does not challenge the trial court's decision to qualify Van Order as an expert in sexual assault examinations.

Order opined that AP's injuries were consistent with forced penetration of the vaginal area by a finger or penis although she could not say whether the injuries were the result of rape.

Van Order's testimony about the mechanism or manner of injury was based on objective medical evidence depicting physical characteristics and was thus admissible. See *Thorpe*, 504 Mich at 255; *Smith*, 425 Mich at 114-115; MRE 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); *People v Hunter*, 141 Mich App 225, 233-234; 367 NW2d 70 (1985) (holding that the trial court did not err when it allowed a treating physician to testify that the victim's injuries were "consistent with forcible entry into the vagina by either a penis or a blunt instrument").[2] Van Order conceded that she did not know whether AP had been raped, but merely opined that AP's injuries were consistent with her description of events and with the use of force to achieve penetration, which was within the realm of Van Order's expertise and experience.

With respect to Wimberly's specific argument on appeal, we do not view Van Order's opinion testimony as being dependent on the fact that examinees with injuries similar to those exhibited by AP had informed Van Order that they had been sexually assaulted. We assume that all persons Van Order examined in her role as a SANE alleged that they were victims of sexual abuse and assaults. Rather, Van Order's opinions were clearly based on the nature of the physical injuries that were plainly not consistent with consensual or nonforcible sexual intercourse.[3] And any deficiencies or weaknesses in her opinions went to matters of weight and credibility, not admissibility. See *People v Muhammad*, 326 Mich App 40, 52-53, 57-58; 931 NW2d 20 (2018). In sum, the trial court did not err when it allowed Van Order to offer opinion testimony that AP's injuries were consistent with her description of events and with the use of force to effect penetration.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Wimberly next alleges numerous instances of alleged ineffective assistance of counsel. Whether counsel was ineffective presents a mixed question of fact and constitutional law, and factual findings are reviewed for clear error, whereas questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), the Michigan Supreme Court set forth the principles governing a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test . . . . First, the defendant must show that

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[2] *Hunter* was cited with approval by our Supreme Court in *Smith*, 425 Mich at 110 n 7.

[3] With regard to studies, in his motion to preclude Van Order's testimony, Wimberly cited studies that actually supported Van Order's opinion. For example, in one study, the authors reported that lacerations after coitus were present in 4.54% of the consenting group whereas lacerations were present 40% of the time in the nonconsenting group. Thus, the study corroborated Van Order's opinion that such injuries were consistent with the use of force and were far more frequently reported as the result of nonconsensual sexual encounters.

> counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and quotation marks omitted.]

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Wimberly first argues that his attorney was ineffective for failing to investigate impeachment evidence that was available through Anita Martin and Ginny Braddock and failing to call them as witnesses at trial. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (principles also apply in regard to expert witnesses). We cannot, however, insulate the review of counsel's performance by simply calling it trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Initially, this Court must determine whether strategic choices were made after less than complete investigation, with any choice being reasonable only to the extent that reasonable professional judgment supported the limitations on investigation. *Id.*; see also *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015).

Wimberly claims that Anita Martin, who is his aunt and Martin's mother, would have testified that she had seen AP at her house on one occasion and that AP told her that Wimberly was her boyfriend. On the record before this Court, defense counsel may have had a strategic reason for refusing to call Anita Martin. In a police officer's investigative report, the officer indicated that Wimberly's father informed the officer that his sister, Anita Martin, habitually lied to protect her son's criminal activities. Had Anita Martin testified, the prosecution could have explored her problem with credibility. Given the evidence of Martin's involvement in the rape and his mother's credibility issues, defense counsel might reasonably have concluded that it was better not to call Anita Martin to the stand. Accordingly, we cannot conclude that counsel's failure to call Anita Martin as a witness for the defense fell below an objective standard of reasonableness.

The same flaws exist with regard to Wimberly's claim that defense counsel should have called to the stand Ginny Braddock, who was Wimberly's girlfriend at the time of trial. Braddock ostensibly would have testified that she drove Wimberly to Martin's home to meet AP for sex and that she saw AP waiting at Martin's home. Braddock's proposed testimony would have also indicated that AP "liked" a photograph on Facebook depicting Wimberly at some point years after the events at issue, which is a point that the jury was made aware of through AP's testimony on cross-examination. There was a police report that strongly indicated that Braddock had credibility

issues that could have been explored on cross-examination and that might have harmed the defense. The officer noted a recorded phone call between Braddock and Wimberly in which Braddock asserted that she was an excellent liar; indeed, she bragged that she could "sweet talk any mother f***in' body" and could even "sweet talk a mother f***in' Eskimo into buyin' some ice." The call suggested that Braddock was offering to lie on Wimberly's behalf, which undermined rather than supported his version of events. For that reason, a reasonable defense attorney might have refrained from using Braddock as a witness so as to avoid an inference that Wimberly encouraged Braddock to lie on his behalf. Counsel's performance was not deficient.

Wimberly next argues that defense counsel's decision not to call Dr. Joseph Riethman to testify amounted to ineffective assistance. He contends that Dr. Riethman could have offered testimony to undermine the medical evidence and SANE Van Order's testimony that AP's injuries were consistent with having been forcibly sexually penetrated. Dr. Riethman testified on Wimberly's behalf at the hearing to determine whether Van Order's testimony should be limited. Dr. Riethman testified that he was in private practice in obstetrics and gynecology. He criticized the images taken of AP's genitals 15 years earlier as being of poor quality, and Dr. Riethman believed that Van Order had oriented the pictures incorrectly when she described the injuries depicted in them. He also opined that the photographs did not suggest trauma, but rather were the result of blue toluidine dye getting stuck in crevices of AP's vaginal area.[4] Finally, Dr. Riethman testified that one could not state from the nature of an injury whether it was the result of consensual or nonconsensual sexual intercourse.

Dr. Riethman, however, admitted that he did not use blue toluidine dye in his practice and had last used it 25 years earlier as a resident when he performed a few examinations on alleged sexual assault victims. His expectations about how the dye should look in photos, he explained, were premised on knowledge that he gleaned from some peer reviewed publications. As a result of his review of those publications, Dr. Riethman expected that the blue toluidine dye would show in a thin line rather than globs. He also agreed that blunt force trauma can occur if an object is thrust against the skin between a female's labia majora and labia minora. At the hearing, Van Order identified the injuries that she believed were revealed by the blue toluidine dye and opined that the combined injuries—abrasions on both sides of the vagina between the labia minora and labia majora—were relatively rare. Van Order testified at trial consistently with her testimony at the hearing.

Defense counsel could have called Dr. Riethman at trial to testify that he did not see any evidence of injuries in the photographs, but his testimony would not have been particularly credible or helpful in the face of the other testimony and evidence. As noted, Dr. Riethman admitted that his opinion was predicated on the poor quality of the images and his belief that the blue toluidine dye depicted in the photographs was not indicative of injury. But Dr. Riethman conceded that he did not use the dye in his regular practice and that he had last used it more than 25 years earlier as a resident. By contrast, Van Order regularly used the dye and had performed or peer reviewed more than 1,700 sexual assault examinations. As such, Dr. Riethman's opinion about the nature

[4] Blue toluidine dye is used during sexual assault examinations to reveal and visualize any lesions caused by an assault that are not visible without an enhancement agent.

of the injuries depicted in the images would not have held much weight. In fact, his lack of experience in the area of sexual assault examinations was so profound that a reasonable juror might have questioned why the defense would rely on such an expert if there were a legitimate dispute over whether AP had suffered trauma to her vagina. Moreover, defense counsel must have understood that the SANE who actually performed the examination of AP would testify at trial—as she did—and that she observed the trauma to AP's vagina, which she documented on the record and in the photographs. Given his lack of experience with sexual assault examinations and the use of toluidine blue dye, it is doubtful that a jury would have given any weight to Dr. Riethman's opinion that the photographs did not show the injuries identified by the SANE and confirmed by Van Order's review of the report and images. Accordingly, a defense lawyer confronted with this record could readily have concluded that Dr. Riethman's testimony would not be helpful and might in fact be harmful. For that reason, Wimberly has not overcome the presumption that defense counsel's decision not to call Dr. Riethman to the stand was a matter of reasonable trial strategy.

For similar reasons, even if we assume that defense counsel's decision not to call Dr. Riethman fell below an objective standard of reasonableness under prevailing professional norms, Wimberly has not shown that there is a reasonable probability that but for the presumed error, the outcome would have been different. The evidence overwhelmingly established that AP reported physical injuries and described vaginal pain and soreness, that the SANE who examined her testified that she observed injuries to AP's vagina, and that Van Order confirmed that the images reflected the presence of injuries. In the face of that evidence, Dr. Riethman's opinion that the images did not clearly depict an injury because the blue toluidine dye was improperly applied would not have affected the outcome.

Next, Wimberly complains that defense counsel failed to adequately impeach AP on cross-examination. Whether and to what extent to cross-examine a witness is a matter of trial strategy that courts will not second guess with the benefit of hindsight. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Brasic*, 171 Mich App 222, 233; 429 NW2d 860 (1988). Wimberly first claims that defense counsel should have more thoroughly explored AP's initial report that she was raped by two different African-American men who picked her up. At trial, AP admitted that she had initially lied to the police about her assailants. Wimberly's testimony, however, was that he had a consensual sexual encounter with AP. And a reasonable defense lawyer in defense counsel's position would not have spent significant time cross-examining AP about her original story because such questioning would have served to emphasize that AP thereafter consistently maintained that Wimberly and Martin picked her up on the night in question and that she was raped in a car, not that she was injured during a consensual sexual act with Wimberly in a bed at Martin's home. Defense counsel's performance was not deficient.

Wimberly also contends that defense counsel should have impeached AP with evidence that she told an emergency medical responder that she did not have any injuries and that the emergency responder did not observe any injuries. Wimberly argues that such cross-examination would have undermined AP's claim that she suffered a scratch when she escaped from the car after the sexual assault. We conclude that exploring the issue raised by Wimberly would have ended up highlighting that AP had in fact immediately reported that she had been raped and sustained documented injuries that were consistent with some type of altercation, including the very scratch that she failed to report to the first responder. This would have served to emphasize her leg injury,

which AP said occurred while escaping from Martin's car, whereas it was Wimberly's story that he was never in Martin's car with AP. Defense counsel cannot be faulted for refraining from cross-examining AP in a manner that would only have served to reinforce AP's testimony.

Wimberly similarly maintains that defense counsel provided ineffective assistance by failing to impeach AP about the fact that she reported that the attack in the car occurred at two different street locations, that she informed one first responder that she had been raped by both African-American men and then told another that she had only been raped by one, and that she was inconsistent about whether the rape began in the front seat and moved to the backseat or whether the whole event occurred in the backseat. These claims too are without merit. AP's memory problems were evident to the jury at trial and cross-examination about these details would only have served to emphasize that AP was at least consistent when she stated that she had been raped, that the rape involved two African-American men, and that it occurred in a car. The defense theory of the case was that AP had not been raped in a car, but had instead fabricated a rape claim after a consensual sexual encounter because she was angry with Wimberly and, in part, because her family members were racists and AP did not want to admit that she had engaged in sex with an African-American man. A reasonable lawyer would not have risked undermining that position by getting AP to repeat her story in a way that highlighted the consistencies between her initial story and her present testimony.

Wimberly also argues that defense counsel should have confronted AP about her alleged sexual history with Wimberly and, more specifically, about his claim that she was the source of an STD. AP, however, denied having had any relationship with Wimberly. And repeatedly questioning her in the face of her denial would have served no useful purpose except to demonstrate that she was adamant about not having had any relationship with Wimberly. The fact remained that Wimberly's contention that he had engaged in a longstanding casual sexual relationship with AP—a relationship that in his words involved nearly daily contact—was diametrically opposite of AP's claim that they did not spend time together. Emphasizing her position by eliciting denials on cross-examination might have undermined the defense that AP contrived her story. Wimberly has not demonstrated that defense counsel's failure to cross-examine AP in these ways fell below an objective standard of reasonableness.

In a related claim, Wimberly argues that defense counsel should have questioned him on direct examination about his STD and the source of that STD. Wimberly does not explain why he did not volunteer the information when testifying about his purported longstanding casual sexual relationship with AP, but, in any event, he has not shown that defense counsel's failure to question Wimberly about his treatment for STDs and his beliefs as to the source of his infections fell below an objective standard of reasonableness. Defense counsel's position was that Wimberly was a "cad" who was looking to "step out" on his girlfriend, but not a "rapist." And Wimberly offered testimony that was consistent with that theory. Wimberly testified that he brought "girls" to his aunt's house for the purpose of sex because his aunt was so frequently away. He further stated that he had a girlfriend but was still having regular sex with AP. Given that testimony, it is unclear how exploring Wimberly's history of STDs would have furthered his defense. There was no way to independently confirm that AP had transmitted an STD to Wimberly, and he already testified that they had been involved in a consensual sexual relationship. Under the facts of this case, a reasonable defense lawyer would not have felt compelled to explore his client's history of STDs and his speculation about the possible sources, especially after Wimberly essentially admitted that

he had multiple sexual partners at the time. For these reasons, Wimberly has not demonstrated that defense counsel's decision fell below an objective standard of reasonableness.[5]

Finally, Wimberly maintains that defense counsel should have obtained AP's mental health records to show that she had other possible sources for her extreme emotional problems, which had otherwise been connected to the rape. But Wimberly has not shown that AP had actually sought treatment from mental health providers. As such, he failed to establish that there were records to obtain, which forecloses appellate review. See *Carbin*, 463 Mich at 600 (a defendant bears the burden to establish the factual predicate for his claim).[6]

Wimberly raises additional claims of ineffective assistance in his second supplemental brief on appeal. He argues that his trial counsel provided ineffective assistance by failing to file an interlocutory appeal of the trial court's decision to deny his motion to dismiss premised on prearrest delay. Because we have already concluded that the trial court did not err when it denied his motion, defense counsel cannot be faulted for failing to file a meritless interlocutory appeal of that order. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Wimberly also complains that defense counsel should have admitted the entire Facebook post with Wimberly's picture, which had been made years after the events at issue and that AP "liked." Wimberly provides no discussion of the facts or law supporting his claim that defense counsel was ineffective for failing to introduce the unredacted post. By failing to offer any meaningful discussion of this claim of error, Wimberly abandoned it on appeal. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Even considering the arguments that Wimberly made regarding the Facebook post in his motion for remand, Wimberly has not established that defense counsel's handling of the evidence fell below an objective standard of reasonableness that prejudiced his trial. In his motion, Wimberly claimed that the entire Facebook post would have shown that AP bore him no "ill will" and "possibly still had sexual feelings for him." Wimberly also maintained that the full post would have undermined the prosecutor's arguments concerning the possible reasons for AP's decision to

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[5] With respect to Wimberly's whole defense that he had a relationship with AP and that they engaged in consensual sex, we surmise that the jury likely discounted his claims given that the assertion of a relationship only came after he denied having sex with AP but then was confronted with the DNA evidence.

[6] Moreover, the prosecution called an expert, Connie Black-Pond, who testified generally about the ways that trauma and sexual abuse might affect a person. As Wimberly admits on appeal, defense counsel elicited testimony from Black-Pond that a person who fabricates a criminal claim against another person might suffer distress if the fabricated claim resurfaced years later. Defense counsel, thus, provided the jury with testimony that AP's responses might be explained by the fact that she made up a lie about Wimberly, which was consistent with the defense's theory. Counsel's decision to elicit that testimony in lieu of some other speculative method for explaining AP's emotional response did not fall below an objective standard of reasonableness.

"like" the post. Wimberly's arguments are unconvincing. There is simply nothing about the full Facebook post that gave it any more weight than the redacted post presented to the jury.

V. PROSECUTORIAL MISCONDUCT

We next address Wimberly's claim that the prosecutor engaged in several instances of misconduct that deprived him of a fair trial. To preserve claims of prosecutorial misconduct, the defendant must object to the misconduct at trial. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). As Wimberly concedes on appeal, defense counsel did not object to the prosecutor's remarks. Therefore, these claims of error are unpreserved and are reviewed for plain error affecting substantial rights. *Id.* at 475-476.

Wimberly first complains that the prosecutor engaged in misconduct by summarizing the expected testimony of AP's best friend at the time of the incident during the prosecutor's opening statement. Specifically, Wimberly contends that it was error or misconduct to do so because the friend ultimately did not testify. If, during an opening statement, the prosecutor indicated that particular facts will be shown but no such evidence is produced at trial, error occurs if the prosecutor did not make the statement in good faith or the remarks prejudiced the defendant's trial. See *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997). AP's friend was personally served a trial subpoena by the prosecutor. An officer was sent to her home, but no one answered the door despite the fact that the officer heard people inside and saw the friend's car. Additionally, the trial court issued a bench warrant for the friend's arrest at the behest of the prosecutor, which eventually led to two days in jail for contempt. Accordingly, the record established that the prosecutor had a good-faith belief that AP's friend would honor the subpoena and testify in court and, when the friend failed to appear, the prosecutor took reasonable steps to compel her appearance. As such, the prosecutor did not commit misconduct by summarizing the friend's prospective testimony in her opening statement. Additionally, the trial court instructed the jury that it must decide the case solely on the evidence admitted at trial and that the statements of the attorneys were not evidence. Those instructions cured any minimal prejudice arising from the prosecutor's opening statement. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

Wimberly also argues that the prosecutor made improper remarks about a note discovered on the rape kit in both her opening statement and closing argument. The prosecutor informed the jury that at some point after AP's rape kit was delivered to the police department someone put a note on it that read: "The victim on this case lied." The prosecutor said that she did not know who wrote that note and that there would be no evidence regarding who wrote it. She speculated that perhaps the note was the reason that the kit sat untested in the police department for all those years. The prosecutor's opening remarks about the note were not improper. The prosecutor apparently described the note accurately, and there was no witness who could say how the note ended up on the rape kit. Therefore, the remarks were proper commentary on the evidence that would be presented to the jury. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

Wimberly similarly faults the prosecutor for arguing in her closing that the note was irrelevant to determining the only real issue in the case—consent. The prosecutor told the jury that the note did not matter because it was unconnected to what happened in the car, and the jury

would have to speculate about what the author intended by the note. She argued that the author's intent did not matter because it was the jury's burden alone to decide "if this is a rape or not" on the basis of the evidence. The prosecutor's comments about the import of the note amounted to nothing more than an argument about the evidentiary value of the note. The note—at best—amounted to a statement of opinion by a person involved with the investigation. It was not direct evidence of any fact at issue in the case and its author was unknown. Under these circumstances, the prosecutor could properly argue that the jury should not give any weight or consideration to the note. See *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987).

Wimberly also argues that the prosecutor made improper remarks concerning AP that amounted to vouching for her credibility. A prosecutor may not make comments that convey to the jury that he or she has some special knowledge or facts indicating that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). The prosecutor, however, is free to argue the evidence and all the reasonable inferences that may be drawn from it. *Id.* at 282. Likewise, the prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

In her closing argument, the prosecutor contended that the facts showed that Wimberly lied about the events and that AP told the truth. She maintained that the evidence corroborated AP's testimony. The prosecutor asked the jury to consider what motive AP had to lie 15 years after the fact and whether the evidence that AP ran hysterically through the neighborhood on the night at issue was more consistent with Wimberly's story of consensual sex and a broken heart or AP's version of a forcible rape. The prosecutor also commented that if AP were lying, she could have done a better job of it. She argued that AP could have testified more consistently with her statements from 15 years earlier if she were making up the assault. The prosecutor asserted that the reason AP's story was so disjointed was because she was telling the jury what actually happened to the best of her ability 15 years after the fact. The prosecutor at no point suggested that she had special knowledge that AP was telling the truth. Instead, she argued—as she could properly do—that AP's version of events was more credible than Wimberly's diametrically opposite version. Because the prosecutor argued that AP was the more credible witness on the basis of the totality of the evidence, her remarks were not improper.

Wimberly also states in passing that the prosecutor argued facts not in evidence when she stated that AP only lied to police officers to protect herself and that Wimberly asked an investigator to erase the recording of Wimberly's statement. A prosecutor may not argue facts that were unsupported by the evidence. See *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008).

In her closing argument, the prosecutor acknowledged that AP initially gave the investigating police officers a false story about what had occurred. She suggested that the evidence showed that AP only lied to the officers because she had been illegally selling a gun and was afraid of Wimberly. AP testified that Wimberly threatened to kill her several times during the sexual assault and even choked her. AP asserted that Martin wanted to let her go, but Wimberly at first refused. Additionally, AP testified that she initially lied to the investigating officer because she was afraid that there would be violence and worried that she might be charged with a crime because of the gun. AP's testimony supported the prosecutor's arguments concerning AP's initial failure

to identify Wimberly as her attacker and to be more forthcoming with the details involved in the attack. Accordingly, the prosecutor did not improperly argue facts not in evidence.

The prosecutor also discussed in her closing argument the evidence regarding the investigator's interview of Wimberly. She suggested that Wimberly's statements at that time were indicative of guilt. For example, the prosecutor noted that Wimberly seemed perplexed that the investigator was investigating a 15-year-old incident, which Wimberly thought was "bullshit." She indicated that Wimberly said "no" when asked about whether he had sex with AP, but when confronted with a DNA match, Wimberly asked the investigator to erase the recording so they could "start over." The prosecutor explained that Wimberly's comment was not on the recording because the investigator had stopped the recording at Wimberly's request. The prosecutor's remarks were fully supported by the investigator's testimony at trial.

Finally, Wimberly argues that the prosecutor made improper appeals for the jury to convict on the basis of sympathy for AP and out of civic duty. A prosecutor may not urge the jury to convict out of sympathy for the victim or out of a sense of civic duty. *Unger*, 278 Mich App at 237. On appeal, Wimberly cites a few examples of what he contends were improper appeals for sympathy. When examined in context, however, each argument was proper. See *Abraham*, 256 Mich App at 272-273 (stating that the prosecutor's remarks must be evaluated in context). The prosecutor alluded to evidence about AP being distraught at the time of the sexual assault and when the case was reopened, as well as to evidence revealing that AP was hysterical and emotionally hurt and in pain after the assault. There was testimony that supported the prosecutor's comments, which were made not as an appeal for sympathy for AP but to advance the prosecutor's position that AP was truthful and had indeed been brutally raped by Wimberly.

With respect to civic duty, Wimberly complains that the prosecutor reminded the jury that Wimberly at the time lived in AP's neighborhood and that his cousin, Martin, lived right behind AP's home. He also faults the prosecutor for remarking that Wimberly was known in town as a rapist. The prosecutor did remind the jury that Wimberly lived in the same neighborhood as AP, but did so as part of her argument that the evidence supported AP's stated reason for fearing Wimberly, which was not at all improper.

Wimberly's claim that the prosecutor attempted to denigrate him and appeal to civic duty by stating that he was known in town as a rapist is likewise without merit. In her rebuttal remarks, the prosecutor reminded the jury about the evidence that Wimberly's family and AP's family had altercations after the day at issue, which she suggested indicated that something serious had happened. The prosecutor also argued that the jury should reject the suggestion that the evidence that AP apologized to Wimberly's then girlfriend after the incident at issue was evidence that the incident involved consensual sex. She contended that the former girlfriend's statements and reaction were inconsistent with a girlfriend who had just discovered that she had been cheated on and further noted that it was speculative as to the subject of the purported apology. The prosecutor indicated that it might have been an apology for the fact that word of the sexual assault got out into the community at large. Notably, Wimberly himself testified that he became angry when he learned on the day after the incident that everyone in the neighborhood was referring to him as a rapist. Wimberly explained that he learned about the accusation the next day from his girlfriend, who had encountered AP at a store and learned that AP was "spewing shit" and telling people he "did all kinds of shit." Therefore, Wimberly himself connected the incident at the store with the

claim that the whole town thought he was a rapist. For that reason, the prosecutor could argue from the evidence that the incident at the store did not suggest that AP had been involved in a consensual sexual relationship with Wimberly. The prosecutor's remarks did not amount to improper arguments to convict Wimberly out of a civic duty.

Wimberly has not identified any incidents of prosecutorial misconduct, let alone plain, outcome-determinative error.[7] Because the prosecutor did not engage in any misconduct, Wimberly's claim that defense counsel was ineffective for failing to object to the comments is also meritless. See *Snider*, 239 Mich App at 425.

VI. SENTENCING ERRORS

Wimberly also argues that the trial court erred when it sentenced him. More specifically, he maintains that the trial court erred when it assigned points under his offense variables on the basis of acquitted conduct and when it failed to properly articulate a basis for imposing consecutive sentences. We decline to address the latter claim of error because we agree that Wimberly must be resentenced and, for that reason, the trial court will have to again consider whether to exercise its discretion to order consecutive sentencing.

At sentencing, the trial court found by a preponderance of the evidence that Wimberly had in fact digitally penetrated AP as charged by the prosecution even though the jury found Wimberly not guilty of those two charges. The trial court then proceeded to score Wimberly's offense variables on the basis of the digital penetrations. Since Wimberly's sentencing, our Supreme Court has determined that it is a violation of due process for a trial court to sentence a defendant on the basis of acquitted conduct. See *Beck*, 504 Mich at 629 ("We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted."). Therefore, we must vacate Wimberly's sentences and remand for resentencing.

VII. NEW EVIDENCE

In his second supplemental brief on appeal, Wimberly asserts that he has discovered new evidence that warrants a new trial. To establish a right to relief from judgment premised on newly discovered evidence, Wimberly must demonstrate that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial;

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[7] In his second supplemental brief on appeal, Wimberly again asserts that the prosecutor engaged in prosecutorial misconduct. He did not, however, identify or discuss any new incidents of prosecutorial misconduct. Therefore, he abandoned any claims of prosecutorial conduct other than those that we have addressed. See *Martin*, 271 Mich App at 315. Wimberly also adds that the cumulative effect of the errors warrants relief, even if no one error by itself warrants relief. Because we conclude that there was no misconduct, there were no errors to aggregate. See *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

and (4) the new evidence makes a different result probable on retrial." *People v Johnson*, 502 Mich 541, 566; 918 NW2d 676 (2018) (quotation marks and citation omitted).

Wimberly maintains that a witness, Machelle Hyatt-Edwardsw, would testify that she overheard AP state that she "would do" to her then boyfriend what she did to Wimberly if her boyfriend left her. Notably, Wimberly did not support his assertion with an affidavit by Hyatt-Edwards. Rather, he supported his claim that he recently discovered new evidence with an affidavit by a fellow inmate, Terrance Carey.

In his affidavit, Carey averred that Hyatt-Edwards was his ex-girlfriend and the mother of his child. Carey stated that sometime between August 2018 and October 2018, he and Hyatt-Edwards were approached by AP while they were sitting in a car at a gas station. He claimed that before AP reached the car, Hyatt-Edwards informed him that AP had previously "told her she lied on some guys and sent them to prison." He further averred that he would be willing to testify about the statement that Hyatt-Edwards made to him about the statement that AP made to Hyatt-Edwards.

Purported newly discovered evidence must be admissible. *Johnson*, 502 Mich at 571 (stating that the trial court must consider all the evidence that would be admitted on retrial when determining whether the newly discovered evidence warrants a new trial); *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998) (recognizing that newly discovered evidence must be admissible in order to warrant a new trial). On the present record, there is no basis for concluding that Carey's proposed testimony would be admissible on retrial.

A statement by someone other than one made by the declarant at trial or hearing that is offered into evidence to prove the truth of the matter asserted is by definition hearsay. See MRE 801(c). Hearsay is inadmissible unless an exception applies. See MRE 802 and 803. Carey's offer to testify that Hyatt-Edwards made a statement concerning a statement by AP that AP lied and sent two men to prison is hearsay within hearsay. As such, the statement would be inadmissible unless Wimberly could establish a foundation for bringing each independent hearsay statement within a hearsay exception. See MRE 805; *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982). Yet, Wimberly has offered no foundation that any of the hearsay would be admissible under any exception. Accordingly, we conclude that Wimberly has failed to establish that the purported newly discovered evidence is admissible; therefore, he necessarily cannot show that a retrial would produce a different result. *People v Miller*, 141 Mich App 637, 642-643; 367 NW2d 892 (1985) (stating that inadmissible hearsay evidence does not constitute evidence that would cause a different result on retrial).

VIII. CONCLUSION

Wimberly has not identified any errors in his trial that warrant reversal or a new trial. Therefore, we affirm his convictions. Nevertheless, because the trial court relied on acquitted conduct when it determined Wimberly's sentences contrary to our Supreme Court's decision in *Beck*, we must vacate Wimberly's sentences and remand for resentencing consistent with *Beck*. On remand, the trial court shall recalculate the offense variables without relying on acquitted conduct and sentence Wimberly accordingly.

We affirm in part, vacate in part, and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola

Order

Michigan Supreme Court
Lansing, Michigan

April 15, 2022

Bridget M. McCormack,
Chief Justice

163097 & (129)(134)(136)(140)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163097
COA: 342751
Calhoun CC: 2017-001453-FC

JEFFREY RICARDO WIMBERLY,
Defendant-Appellant.

/

On order of the Court, the motions to amend the application and for immediate consideration of the motion to stay are GRANTED. The application for leave to appeal the November 24, 2020 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motions to appoint counsel, to stay, and to compel discovery are DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 15, 2022

Appendix D

Order

Michigan Supreme Court
Lansing, Michigan

June 28, 2022

Bridget M. McCormack,
Chief Justice

163097 (142)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163097
COA: 342751
Calhoun CC: 2017-001453-FC

JEFFREY RICARDO WIMBERLY,
Defendant-Appellant.

/

On order of the Court, the motion for reconsideration of this Court's April 15, 2022 order is considered, and it is DENIED, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 28, 2022

Clerk

a0621

Additional material from this filing is available in the Clerk's Office.