STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2010
v	No. 289540 Grand Traverse Circuit Court
STEVEN DANIEL SMOOT, Defendant-Appellant.	LC No. 08-010647-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant was found guilty by a jury of one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b), for which he was sentenced to 84 to 180 months' imprisonment with credit for 191 days served. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

This case began with an alleged arranged meeting between defendant and the complainant in June 2008. Defendant and others went to the complainant's home and smoked cigarettes and marijuana in her driveway. According to the complainant's testimony, she and defendant went for a walk out of the view of the others and they engaged in three sexual acts. The complainant testified that she did not consent to any of the sexual acts and that defendant had forced himself on her. Defendant testified that the complainant consented to all three sexual acts. Defendant was charged with three counts of CSC III; the jury acquitted him of the first two counts and convicted him of the third count.

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues there was insufficient evidence to support his conviction of CSC III. We review de novo insufficiency of the evidence claims. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This is a deferential standard requiring the reviewing court to draw all reasonable inferences and resolve credibility issues in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In the present case, to properly convict defendant of CSC III, plaintiff had to show that defendant used force or coercion when he sexually penetrated the complainant. MCL 750.520d(1)(b).

> Force or coercion includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
>
> (*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim. [MCL 750.520b(1)(f)(*i*)-(*v*).]

Defendant does not dispute that the three sexual acts alleged actually happened. Nor does he dispute that the prosecutor presented evidence that could support his guilt. Rather, defendant argues that because the complainant's testimony about what happened was inconsistent and her conduct was inconsistent with nonconsensual sex, there was insufficient evidence of his guilt. Defendant also claims the prosecution's other witnesses were not credible.

Given that both the complainant and defendant agree that they engaged in sexual acts, the only issue before the jury was whether it believed the complainant's testimony that the sexual acts were committed without consent and through force or defendant's assertion that all sexual acts were consensual. As the trier of fact, the jury was free to accept a portion or all of either defendant or the complainant's testimony. *People v Unger*, 278 Mich App 210, 228; 749 NW2d 272 (2008). Regardless of any inconsistencies in the complainant's testimony or any perceived questionable conduct on her part on the date in question, the fact remains that the complainant maintained that despite her telling defendant that she did not want to have sex with him, he forced himself on her anyway. This Court has repeatedly held that it is the function of the jury, not the courts, to weigh the competing evidence presented at trial. See *Unger*, 278 Mich App at 228-229, quoting *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002). For that reason, it is immaterial whether the complainant voluntarily walked with defendant down the road, was not wearing any underwear, or had previously had conversations of a sexual nature with defendant on the phone. It was also immaterial whether the other prosecution witnesses were credible. Despite defendant's arguments to the contrary, the complainant's testimony alone was adequate. MCL 750.520(h); *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998).

Defendant argues that because there was a lack of testimony that he actually used force to overpower the complainant, there was insufficient evidence to support his conviction. We find

that defendant is mistaken, based on our reading of our Supreme Court's decision in *People v Carlson*, 466 Mich 130; 644 NW2d 704 (2002). In that case, the Supreme Court explained that the force used:

> must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite "force" for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited "force" encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes. [*Carlson*, 466 Mich at 140.]

In the present case, the complainant testified that defendant pushed her to the ground and put his penis inside her vagina. The complainant testified that she did not want to have sex with defendant and that she pushed him away and told him to stop when he first pulled her into the woods and began kissing her. Also, when defendant performed cunnilingus on her, she told him to stop at least three times and tried to scoot away from him. Although the complainant did not say no to defendant when he pushed her to the ground to have sexual intercourse, she testified that she did not say anything to him or fight him because she was scared. Based on this testimony and our reading of *Carlson*, there was sufficient evidence to find that defendant used force to facilitate the accomplishment of sexual penetration without regard to the complainant's wishes.

Next, defendant argues that because the complainant did not receive any injuries, save a small scratch on her back, there was insufficient evidence to support his conviction. Defendant is in error because defendant's argument relies on his mistaken belief that to be found guilty of CSC III there must be some manifestation of the force used to accomplish the sexual penetration. Our Supreme Court's holding in *Carlson* belies any such argument. Moreover, to be found guilty of CSC III, it is not necessary that the victim suffer an actual injury. MCL 750.520(d).

Lastly, defendant argues that because the complainant did not resist his efforts to have sex with her, there was insufficient evidence to support his conviction. Defendant's argument is without merit. Pursuant to MCL 750.520i,[1] a victim of a sexual assault is not required to resist the defendant in any way. *People v Jansson*, 116 Mich App 674, 683; 323 NW2d 508 (1982).

Thus, viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could reasonably find defendant guilty of CSC III. That the jury was presented with conflicting evidence does not change this conclusion. "It is for the trier of fact, not the appellate court, to determine what inferences may fairly be drawn from the evidence and to determine the weight to be accorded to those inferences." *Hardiman*, 466 Mich at 428.

B. INCONSISTENT JURY VERDICTS

[1] This statute provides: "A victim need not resist the actor in prosecution under sections 520b to 520g."

Defendant next argues that he is entitled to a reversal of his conviction because the jury's verdicts were inconsistent. Specifically, defendant argues that because it was undisputed that he and the complainant engaged in three sexual acts, the jury was required to convict or acquit defendant on all three counts. According to defendant, the jury's inconsistent verdict can only be attributed to its confusion about the law. For that reason, defendant argues he is entitled to a reversal of his conviction.

We review de novo whether a jury's verdicts were inconsistent. See *People v Tombs*, 472 Mich 446, 462-463; 697 NW2d 494 (2005), overruled on other grounds by *People v Nix*, 479 Mich 112; 734 NW2d 548 (2007).

In Michigan, a jury is permitted to reach inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). In *Vaughn*, our Supreme Court stated:

> "Because the jury is the sole judge of *all* the facts, it can choose, without any apparent logical basis, what to believe and what to disbelieve. What may appeal to the judge as 'undisputed' need not be believed by a jury." *People v Chamblis*, 395 Mich 408, 420; 236 NW2d 473 (1975).
>
> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Vaughn*, 409 Mich at 466 (footnote omitted; emphasis in original).]

Even though the jury was permitted to reach inconsistent verdicts, we conclude that the verdicts in this case were not inconsistent. The complainant testified that all three sexual penetrations were not consensual and that she told defendant no when he tried to perform cunnilingus on her and right before he vaginally penetrated her. In contrast, defendant asserted that the complainant consented to all three sexual acts. If there is an interpretation of the evidence that logically explains the jury's findings, the verdict is not inconsistent. *Tombs*, 472 Mich at 462-463. The jury apparently believed that the complainant consented to the cunnilingus and fellatio, but not the vaginal penetration. The jury's acceptance of and rejection of certain components of defendant's testimony and the complainant's testimony in this case logically explains the jury's verdict. Thus, the verdict is not inconsistent.

C. PROCEDURAL AND EVIDENTIARY ISSUES

Defendant argues that the trial court made several procedural and evidentiary rulings that deprived him of a fair trial. Specifically, defendant contends on appeal that the trial court abused its discretion when: (1) it denied defendant's motion for a mistrial, (2) allowed the

complainant's brother to testify as a rebuttal witness, (3) allowed the complainant's mother to testify about the changes in the complainant's behavior following the alleged rape, and (4) ruled that the complainant's sister's testimony regarding the complainant's hearsay statements were admissible under the excited utterance exception.

Defendant's assertion that the trial court abused its discretion in denying its motion for mistrial is based on the assistant prosecutor eliciting testimony from the complainant that she had been sexually assaulted by her brother. At the time the testimony was elicited, the trial court had yet to rule on the admissibility of such testimony. Defendant argues that the trial court abused its discretion when it denied his motion for a mistrial based on the assistant prosecutor's conduct in eliciting this testimony.

A trial court's decision whether to grant a motion for a mistrial is reviewed for an abuse of discretion. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Absent a showing of prejudice, an error does not warrant reversal. *Id*.

In the present case, before the start of trial and opening arguments, the trial court informed the assistant prosecutor, that prior to eliciting any testimony, that the complainant's brother had previously sexually assaulted her, the assistant prosecutor had to raise the issue outside the presence of the jury. The assistant prosecutor informed the trial court that the issue would not be raised in opening argument, but that the complainant would testify about the matter during direct examination. The assistant prosecutor argued that the incident was relevant to rebut defendant's theory that the complainant did not behave as a person who had been sexually assaulted because such testimony would help the jury to understand why the complainant did not fight defendant. Defendant argued that the testimony was irrelevant, highly prejudicial, and inadmissible pursuant to the rape shield statute, MCL 750.520j. The trial court expressed reluctance to rule on the issue at that time because the prosecutor had not filed a trial brief and, accordingly, it was not prepared to make a ruling. However, on redirect examination, the assistant prosecutor asked the complainant why she did not fight, scratch, or bite defendant when he tried to have sex with her, to which the complainant replied, "Because this has happened before." Defendant objected and the jury was excused. The trial court then appropriately admonished the assistant prosecutor for disobeying its previous order by not giving the trial court an opportunity to make a ruling on the admissibility of the testimony. Before denying defendant's motion, the trial court stated that it did not believe the testimony had prejudiced defendant's case because it did not believe the jury would convict defendant for something that the complainant's brother had done to her. Nonetheless, the court believed that a cautionary instruction was appropriate and would cure any prejudice arising from the assistant prosecutor's error; hence, the jury was recalled and the trial court gave the following curative instruction:

> Okay, members of the jury, when we broke, there was some single answer about something about it happened once before. I'm striking that answer, because it's completely irrelevant.
>
> It turns out that what was being referred to had nothing to do with this Defendant, nothing to do with this incident. Indeed, it is separated from this incident by a period of years. So it is completely irrelevant to what did or did not happen here.

A trial court should grant a mistrial only where the prejudicial effect of an error cannot be cured any other way. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). The purpose in objecting to a prosecutor's improper conduct at trial is to seek a curative instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Curative instructions are deemed to cure most errors. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009). Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998).

Defendant does not demonstrate that the instruction given by the trial court failed to cure any defect arising as a result of the assistant prosecutor's improper questioning or that the jury failed to follow the trial court's curative instruction. Moreover, in its final instructions, the trial court told the jury that it could only base its decision regarding defendant's guilt on evidence that was properly admitted. The trial court instructed the jury that any evidence that it had excluded or stricken was not evidence and could not be considered when deciding defendant's guilt. The trial court also instructed the jury that lawyers' questions were not evidence. Because jurors are presumed to follow their instructions, *Abraham*, 256 Mich App at 279, citing *Graves*, 458 Mich at 482, defendant is not entitled to relief on this issue.[2]

Second, defendant argues that the trial court abused its discretion when it allowed the assistant prosecutor to call the complainant's brother as a rebuttal witness. The basis for defendant's argument in this regard is the assistant prosecutor's representations to defendant and the trial court regarding who the assistant prosecutor intended to call as rebuttal witnesses.

Before defendant's case-in-chief, the trial court and the parties discussed whether the assistant prosecutor anticipated calling any rebuttal witnesses. Because the trial court did not issue a formal sequestration order, defendant wanted to clarify whether the assistant prosecutor anticipated calling any of the witnesses that had remained in the courtroom during the proceedings. The assistant prosecutor informed the trial court that if it did call a rebuttal witness, it would be the complainant. After defendant rested, the assistant prosecutor asked to call the complainant's brother as a rebuttal witness to rebut defendant's testimony that he did not tell the brother that defendant had had sex with the complainant and that it was consensual. Defendant's objection to this testimony was twofold: first, the brother had been in the courtroom during the presentation of defendant's case and second, the assistant prosecutor had made representations that his only rebuttal witness would be the complainant.

Following the parties' arguments, the trial court ruled that the assistant prosecutor could call the brother for the limited purpose requested. The trial court explained that while it was concerned about the assistant prosecutor's representation that it did not intend to call any rebuttal witnesses other than the complainant, it did not find that a sufficient basis to deny the assistant prosecutor's request to question the complainant's brother.

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[2] We recognize that evidence that the complainant might have been raped before could raise a question of the admissibility of that type of evidence under the rape shield statute, MCL 750.520j. Because the trial court did not rule on this issue, we make no decision regarding the admissibility of such evidence under that statute.

Defendant does not deny that the complainant's brother's testimony was proper rebuttal evidence. Rather, his argument rests on the mistaken assumption that because of the prosecutor's representations, the trial court could not properly allow the rebuttal testimony without violating defendant's due process rights. First, defendant cites no authority compelling this Court to conclude that the trial court's ruling was improper. Second, because a criminal trial is not scripted play, a trial court must have broad power to address situations that might arise in the adversary process. MCL 768.29; *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996), relying on *Geders v United* States, 425 US 80, 86; 96 S Ct 1330; 47 L Ed 2d 592 (1976). Because the brother's testimony was proper rebuttal evidence, *People v Natella*, 215 Mich App 77, 85; 544 NW2d 667 (1996),[3] it cannot be said that the trial court's decision was an abuse of discretion.

Even if we were to concur with defendant that the actions of the assistant prosecutor constituted error, defendant is not entitled to relief on this issue because he has not established the requisite prejudice. *Wells*, 238 Mich App at 390. It is undisputed that defendant and the complainant engaged in three sexual acts that were the subject of defendant's trial. We conclude the brother's rebuttal testimony that defendant told him that defendant and the complainant had consensual sex bolsters rather than rebuts defendant's defense. Thus, even if improperly admitted, defendant was not prejudiced by the brother's testimony because the rebuttal testimony merely bolstered defendant's defense. Therefore, defendant is not entitled to relief on this issue.

Third, defendant argues that the trial court abused its discretion when it allowed the complainant's mother to testify that the complainant's demeanor and behavior changed after this incident. MRE 402 states that "[a]ll relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." Evidence is relevant if has a tendency to make a fact in issue more or less probable than without the evidence. MRE 401.

In the present case, defendant maintained that the complainant consented to the sexual acts that occurred between them. Another theory proffered by defendant was that the complainant fabricated her story that he had raped her because she thought accusing defendant of rape was a game or because she felt guilty for cheating on her boyfriend. Thus, based on defendant's fabrication theory, whether the complainant's behavior changed after the alleged rape was relevant to a determination whether she was sexually assaulted. MRE 402. The argument that changes in the complainant's behavior could have been attributed to something other than a sexual assault goes more to the credibility to be afforded the testimony rather than its admissibility.

Contrary to defendant's argument, the complainant's mother's testimony in this regard was not inadmissible junk science. Her testimony was based on her perceptions and observations of the complainant's behavior, not hypothetical facts, and thus was proper lay opinion. MRE 701. Moreover, she did not testify that the changes in the complainant's behavior

[3] See also *Figgures*, 451 Mich at 399 (stating that whether rebuttal evidence is admissible is not dependent upon whether it could have been introduced during the prosecution's case in chief, but rather whether the evidence is responsive to material presented by the defense).

were consistent with how a sexual assault victim might behave after a sexual assault, nor did she offer any scientific opinions or evidence. She simply testified that the complainant's behavior changed after the alleged sexual assault. For that reason, we reject defendant's argument. See *Unger*, 278 Mich App at 216-220.

Lastly, defendant argues that the trial court abused its discretion when it ruled that several hearsay statements made by the complainant to her sister were admissible under the excited utterance exception.

Pursuant to MRE 803(2), a statement is not inadmissible hearsay if it is related to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." There are two primary requirements for a statement to be admissible under the excited utterance exception: "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), citing *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1998).

The startling event in this case was the sexual assault of the complainant by defendant. *Straight*, 430 Mich at 424. Thus, the only question is whether the complainant was still under the stress of the event when she made the statements to her sister. *Id*. Several witnesses testified that when the complainant returned to the house with defendant, she did not seem like herself and they thought something was wrong with her. In addition, the complainant's sister testified that immediately before the complainant made the statements, she was crying and could barely utter any words. Based on this testimony, the trial court could reasonably conclude that the complainant was still under the stress of the sexual assault when she made the statements, thus qualifying them as excited utterances. The Court gives wide discretion to a trial court's decision that a declarant was still under the stress of the startling event. *Smith*, 456 Mich at 552.

Defendant argues that because there was a lapse in time between the sexual assault and when the complainant made the statements to her sister, the trial court should have excluded the statements. Defendant is mistaken. The proper focus in determining the admissibility of a statement under the excited utterance exception is whether the declarant had the capacity to fabricate, not whether there was a lack of time for the declarant to fabricate. *Id.* at 551. "[A] person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *Smith*, 456 Mich at 550, quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19; see also *People v Kowalski*, 215 Mich App 554, 559; 546 NW2d 681 (1996) (upholding a 30- to 45-minute lapse in time and stating there is no definite and fixed period of time to consider when deciding whether a statement is admissible under the excited utterance exception).

D. IMPROPER JURY INSTRUCTION

Defendant next argues that the trial court deprived him of a fair trial when it improperly instructed the jury regarding consent. Specifically, he argues that because the trial court refused to read Michigan Criminal Jury Instruction 20.27 in its entirety, he is entitled to a new trial.

A trial court has an obligation to instruct the jury of all the applicable law and to present its instructions in an understandable manner. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). If supported by the evidence, a court must give a requested instruction. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

CJI2d 20.27, which is applicable in sex crimes where the defendant alleges consent, states:

> (1) There has been evidence in this case about the defense of consent. A person consents to a sexual act by agreeing to it freely and willingly, without being forced or coerced.
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> (2) It is not necessary to show that [name complainant] resisted the defendant to prove that this crime was committed. Nor is it necessary to show that [name complainant] did anything to lessen the danger to [himself/herself].
>
> (3) In deciding whether or not the [name complainant] consented to the act, you should consider all of the evidence. It may help you to think about the following questions:
>
> (a) Was [name complainant] free to leave and not take part in the sexual act?
>
> [(b) Did the defendant threaten (name complainant) with present or future injury?]
>
> [(c) Did the defendant use force, violence, or coercion?]
>
> [(d) Did the defendant display a weapon?]
>
> [(e) *Name any other relevant circumstances*.]
>
> (4) If you find that the evidence raises a reasonable doubt as to whether [name complainant] consented to the act freely and willingly, then you must find that defendant not guilty.

Contrary to defendant's argument, the trial court was not required to read CJI2d 20.27 in its entirety even though it was requested to do so. A review of CJI2d 20.27 reflects that subsections (a)-(d) are merely examples of situations that might involve force or coercion to help aid the jury in deciding whether consent existed. Although examples are helpful, trial courts are not required to provide a jury with examples to clarify the meaning of a legal term. See *People v Edwards*, 206 Mich App 694, 696-697; 522 NW2d 727 (1994). Moreover, because the CJIs do not have the sanction of the Supreme Court, a trial court is not required to use them. See *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Because the trial court's instructions to the jury, as a whole, fairly presented the issues to be tried and the substance of defendant's consent defense, and because instructing that force or coercion might exist if defendant displayed a weapon would only confuse the jury since it was undisputed that no weapon was involved, defendant is not entitled to relief on this issue.

We also find unconvincing, defendant's argument that because the trial court did not read CJI2d 20.27 in its entirety, the jury was confused. Although the jury requested clarification of the definition of consent, the instruction the trial court gave was not inadequate and did not fail to alleviate any confusion the jury might have had regarding consent.

E. PROSECUTORIAL MISCONDUCT

Next, defendant argues he was denied a fair trial when the assistant prosecutor committed several instances of prosecutorial misconduct. Defendant asserts several instances at trial in which the prosecutor's conduct was improper. We find merit to two of his claims only, so we will limit our discussion to just those two.[4]

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's statements is determined from an evaluation of the statements in light of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant argues that the assistant prosecutor improperly questioned him during cross-examination about his lack of employment and income. While the questioning on issues of defendant's lack of a steady job and his income was limited, it bore no relationship to any issue presented at trial and clearly constituted prosecutorial misconduct.

Generally, it is improper for a prosecutor to question a defendant about his lack of employment and income. *People v Johnson*, 393 Mich 488, 496-497; 227 NW2d 523 (1975).

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[4] Defendant's complete list of prosecutor error is as follows: (1) that after defendant was read his rights he asked for an attorney and refused to talk to the police; (2) that defendant did not have a consistent job or income; (3) that the complainant had been raped by her brother; (4) that the complainant's mother would testify that the complainant had changed since the rape (stated by the prosecutor in his opening statement); (5) that defendant had brought marijuana to the complainant's house and everyone there was smoking it; (6) that the complainant told her boyfriend about the rape; and (7) that defendant did not care about STDs or pregnancy because he did not use a condom (stated by the prosecutor in his closing argument). In addition, during closing argument, defendant contends that the assistant prosecutor improperly made several arguments that were not supported by the evidence, improperly appealed to the sympathy of the jury, and denigrated defendant and his counsel. Further, the prosecutor's opening argument improperly shifted the burden of proof to defendant and improperly told the jury that the complainant's mother would testify about changes in the complainant's behavior after the alleged rape. Absent these errors, defendant argues that he would not have been convicted, and consequently, he is entitled to a reversal of his conviction.

> [T]o "assume that wealth exerts a greater attraction on the poor than on the rich". To do so would "effectively establish a two-tiered standard of justice and demolish Pro tanto the presumption of innocence". Our system of justice and its constitutional guarantees are simply too fragile to permit this type of unfounded character assassination. [*People v Andrews*, 88 Mich App 115, 118; 276 NW2d 867 (1979).]

We find most troubling the assistant prosecutor's statement that because defendant did not have a steady job and had little money it gave him a motive to sexually assault the complainant. Such an argument is the archetype of unfounded character assassination expressly prohibited by our Supreme Court in *Johnson*. That argument, along with the assistant prosecutor's questioning of defendant regarding those issues, was highly improper and as previously asserted, constituted prosecutorial misconduct. We are nevertheless bound by prior precedent to reject defendant's claim that a miscarriage of justice occurred. The questions and argument pertaining to defendant's lack of steady employment and income can best be described as fleeting, and nothing in the record leads us to conclude that such questions and arguments had any effect on the outcome of the trial. Also, defendant failed to object to the assistant prosecutor's improper questions, perhaps to avoid jury concentration on the matter, and because any prejudice from the questions could have been cured with a limiting instruction, we are compelled to find that a miscarriage of justice did not occur. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

We also agree with defendant that the assistant prosecutor improperly elicited testimony from the complainant that her brother had previously raped her. Nevertheless, for the reasons already discussed, we find that defendant is not entitled to relief on this claim.

Lastly, defendant argues that the cumulative effect of the assistant prosecutor's errors deprived him of a fair trial. The cumulative effect of several minor instances of misconduct can warrant reversal even when the individual errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Our review of the entire record in this matter creates a close question regarding whether the cumulative effect of the assistant prosecutor's instances of misconduct deprived defendant of a fair trial. When expressly told by the trial court not to engage in eliciting certain testimony, the assistant prosecutor ignored the trial court's clear and express ruling and was justly admonished. When asked who would be called to testify as rebuttal witnesses, the assistant prosecutor provided the trial court and defense counsel with inaccurate information. Lastly, the assistant prosecutor asked questions of defendant and made legal arguments which had been expressly forbidden by our Supreme Court since 1975. Thus, the issue before us is not whether there was prosecutorial misconduct, but whether that misconduct was so prejudicial as to deprive defendant of a fair trial.

When improper testimony was elicited, the trial court gave a curative instruction, thereby curing the error. Even though the assistant prosecutor failed to inform the trial court and defendant that the complainant's brother would be called to the stand as a rebuttal witness, the only testimony given by the witness bolstered the defendant's case. Lastly, while we have already indicated our opinion of the improper questioning and argument regarding defendant's lack of steady employment and income, such questions and argument were fleeting and we are not left with an impression that they had any effect on the outcome of the trial. Further, defense counsel may have chosen to allow the wayward remarks to pass so as not to draw attention to his

client's economic status. Thus, when reviewing the record in its entirety, we cannot conclude that the prosecutorial misconduct in this case was so prejudicial that it deprived defendant of a fair trial. For that reason, we also hold that defendant was not deprived of the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

F. SENTENCING

In a supplemental brief, defendant argues that he is entitled to resentencing because the trial court made several errors when scoring Offense Variables 3, 4, and 10 and Prior Record Variable 2.

An appellate court reviews a sentencing court's decision for an abuse of discretion, and must determine whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

Defendant argues that the trial court erred when it assessed 5 points for OV 3 because there was no evidence that the complainant suffered a physical injury. The record reflects that during the sexual assault, the complainant's back was scratched as defendant pushed her to the ground. Albeit slight, the complainant suffered a bodily injury not requiring medical treatment. For that reason and because bodily injury is not an element of CSC III, we find that the trial court properly assessed 5 points for OV 3. MCL 777.33(1)(e); MCL 777.33(2)(d).

Defendant also argues that the trial court erred when it assessed 10 points for OV 4 because there was no evidence that the complainant sought treatment for a serious psychological injury. We disagree. It is not a prerequisite to assessing 10 points under OV 4 that the victim seek treatment for serious psychological injury prior to sentencing. MCL 777.34(2); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Nonetheless, in the complainant's victim impact statement, she stated that she had sought counseling and that this incident had torn her life apart. In addition, she testified at trial that she was scared during the incident. Thus, the trial court properly assessed 10 points for OV 4.

Next, defendant claims the trial court erred when it assessed 5 points for OV 10 because there was no evidence that he exploited the complainant. The record reflects that defendant, age 29, used his size and strength to force the 16-year-old complainant to have sex against her will after they had smoked marijuana and after they had walked away from the other people in their group to an isolated location. The age difference between defendant and the complainant alone was sufficient to support the trial court's assessment of 5 points for OV 5. See *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006) (stating that the trial court properly assessed points under OV 10 when the defendant was 20 years old and the victim was 15 years old). Given the totality of the circumstances, the trial court did not err in scoring OV 5.

Defendant also raises a *Blakely*[5] argument in that he asserts the trial court relied upon facts that had not been proven beyond a reasonable doubt to enhance his sentence. However, as

[5] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

previously discussed, there was sufficient evidence to support the trial court's sentencing decisions. Additionally, our Supreme Court has explicitly held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Lastly, defendant argues that because he had only been previously convicted of two felonies, the trial court erred when it assessed 30 points for PRV 2. A review of defendant's presentence investigation reports reflects that he had been convicted of six felonies prior to his conviction for the instant offense. Therefore, the trial court properly assessed 30 points for PRV 2.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello