

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 4, 2012

v

SAGE GERADAS LEWIS,

Defendant-Appellant.

No. 304535
Ottawa Circuit Court
LC No. 10-035009-FC

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree criminal sexual conduct, MCL 750.520b; and third-degree criminal sexual conduct, MCL 750.520d(1)(c). He was sentenced to 10 years and 6 months to 20 years' imprisonment for first-degree criminal sexual conduct, and 10 to 15 years' imprisonment for third-degree criminal sexual conduct. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the record, this case involves multiple sexual assaults on the victim by defendant and two co-defendants: Jordan Paris (Jordan) and his father, Kelly Paris (Kelly). Defendant, the victim, and Jordan decided to hang out and drink at Jordan's father's house one evening. Defendant and Jordan were both 19 years old, and the victim was 17 years old. The victim had finished one mixed drink containing vodka before they all decided to go to the shed in the backyard that contained a hot tub. Someone prepared another drink for the victim before they went to the hot tub. The shed containing the hot tub was 10 feet by 15 feet and also contained a bed and a loveseat. Once they entered, the victim took off all her clothes and got into the hot tub; the defendant and Jordan followed wearing only their undershorts which they later removed. At some point, Kelly was also present, but it is unclear as to when he arrived. What happened after they entered the hot tub is highly disputed, but according to the victim, she began to feel dizzy, nauseous and eventually lost consciousness. Her next memory was being out of the hot tub, lying down on her back while Jordan was on top of her, having vaginal intercourse with her. She lost consciousness again, and when she regained it, she felt Kelly having vaginal intercourse with her before losing consciousness again. She never agreed to any of the sex acts.

When she awoke, she saw that she was still in the shed with defendant, Jordan, and Kelly, all of whom were naked; she immediately wrapped a sheet around herself and eventually got

dressed. They all went back into the house where they spent the night, but the victim never slept and just sat on the edge of the bed until she left to go to her babysitting job. When she arrived at the place where she babysits, she called her friend, Rose Pearson (Rose), and told her what happened. Her friend immediately drove to where the victim was and called the police once arriving. The victim went to the Center for Women in Transition where she was examined and multiple abrasions were found on her genitals that were consistent with the victim's complaint of sexual assault.

During subsequent police investigation, the police discovered that Kelly had recorded the sexual acts that occurred in the shed. A total of three separate recordings were taken, which were all admitted into evidence for trial. At trial, both defendant and Jordan testified in their own defense. Defendant argued that the victim had kissed him before the night in question and was the initiator during the night in question. Both claimed that the victim seemed conscious and consented to everything that took place. Both also testified that after they finished having intercourse with her, they left her alone in the shed with Kelly and did not know that he was going to also have intercourse with her. When they returned from getting more drinks inside the house, after knocking and finally entering, the victim was crying on the bed. They both also testified that they were not aware that Kelly had recorded the acts and when they found out the next morning, they both got very upset because they knew pornography involving anyone younger than the age of 18 was illegal. This was directly contradicted at the start video recording at which time Kelly indicated to defendant and Jordan "it's on" and then one of them says "you're on webcam."

The victim's consciousness during the sexual acts in the shed was an issue at trial. The victim testified that she usually does not have blackouts when drinking alcohol. A forensic scientist in the Toxicology Unit for the Michigan State Police Crime Lab testified that, after testing the victim's urine for drugs, none were found in her system. An expert in toxicology for the defense testified that the victim's blood alcohol concentration would not have exceeded .10 on the night of the incident. He also testified that the victim's behavior was not consistent with the presence of Gamma-Hydroxybutyrate (GHB) because GHB causes a victim not to have any memory of what happened before waking up and therefore, it was not probable that GHB was slipped into her drink.

The jury found defendant and Jordan guilty of first-degree criminal sexual conduct, multiple variables, and third-degree criminal sexual conduct, incapacitated victim. After initial sentencing, defendant moved to correct an invalid sentence or for resentencing because the trial court erred in scoring offense variable (OV) 3. Defendant also argued that the trial court used an improper burden of proof at sentencing in scoring the OVs. Finally, defendant argued that the trial court's original sentence violated the two-thirds rule for the criminal sexual conduct in the third degree.

The trial court heard defendant's motion and entered an order that changed defendant's sentence for third-degree criminal sexual conduct to 10 to 15 years' imprisonment, acknowledged that OV3 was scored at zero points at sentencing, noted that OV 10 was correctly scored at five points, and that OV 11 was correctly scored at 50 points. The trial court entered an amended judgment of sentence that reduced defendant's sentence for third-degree criminal sexual conduct to 10 to 15 years' imprisonment. Defendant appeals. We affirm.

ANALYSIS

I. INSUFFICIENT EVIDENCE

Defendant first argues that there was insufficient evidence to support his convictions for first-degree and third-degree criminal sexual conduct. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

A person is guilty of first-degree criminal sexual conduct if “he or she engages in sexual penetration¹ with another person,” with proof of an additional circumstance. MCL 750.520b(1). The additional circumstances relevant to this case were (1) the “[s]exual penetration occurs under circumstances involving the commission of any other felony” (MCL 750.520b(1)(c)); (2) the “actor causes personal injury² to the victim, and the actor knows or has reason to know that the victim is . . . mentally incapacitated³, or physically helpless⁴” (MCL 750.520b(1)(g)); and (3) the “actor is aided or abetted by 1 or more other persons and . . . [t]he actor knows or has reason to know that the victim is . . . mentally incapacitated, or physically helpless” (MCL 750.520b(1)(d)(i)).

A person is guilty of third-degree criminal sexual conduct if “the person engages in sexual penetration with another person,” with proof of an additional circumstance. The additional circumstance relevant in this case was whether the “actor knows or has reason to know that the victim is . . . mentally incapacitated, or physically helpless.” MCL 750.520d(1)(c).

Defendant challenges the sufficiency of the evidence on two grounds. First, to find sufficient evidence that defendant was guilty of first-degree criminal sexual conduct through the application of the first additional circumstance argued at trial, it must have been shown that the

¹ “‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.” MCL 750.520a(r).

² “‘Personal injury’ means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.” MCL 750.520a(n).

³ “‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.” MCL 750.520a(j).

⁴ “‘Physically helpless’ means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.” MCL 750.520a.

“[s]exual penetration occur[ed] under circumstances involving the commission of any other felony.” MCL 750.520b(1)(c). In this case, the “other felony” was the production of child sexually abusive material.⁵ Defendant does not challenge that there was the production of child sexually abusive material.⁶ Rather, defendant claims that there was insufficient evidence that he knew that he was being recorded during the sexual acts as required to find that he engaged in the production of child sexually abusive material.

Defendant denies knowing that Kelly was recording at the time of the incident. Although Kelly’s laptop, which was used to record the incident, was located eight feet from where the sexual acts took place, defendant testified that he assumed that Kelly’s laptop was playing music for the group. Music is heard on the recording from some source, however according to a computer forensic examiner, no audio files on Kelly’s computer were accessed at the time of the incident and there was no internet activity on Kelly’s computer related to the playing of music at the time of the incident. Further, Kelly audibly mentioned to defendant that the webcam⁷ was recording his actions with the victim. Moreover, defendant knew that Kelly’s laptop could record, and Kelly’s laptop’s webcam had a small light that illuminated when the camera was activated. These facts are circumstantial evidence that defendant knew that Kelly was recording, and “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Also, because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient and the actor’s state of mind may be inferred from all the evidence presented. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). The evidence, viewed in the light most favorable to the prosecution, would allow a rational trier of fact to reasonably infer from that evidence that defendant knew that they were being recorded, as required to find that the first additional circumstance for first-degree criminal sexual conduct was proven beyond a reasonable doubt. *Wolfe*, 440 Mich at 515-516.

⁵ The felony of the production of child sexually abusive material is defined in MCL750.145c. MCL 750.145c provides in relevant part that:

[a] person who . . . knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child . . . [MCL 750.145c(2).]

⁶ “Child sexually abusive material” means, in relevant part, “any depiction, whether made or produced by electronic, mechanical, or other means, including a . . . electronic visual image, . . . ” MCL 750.145c(m). In this case, Kelly Paris recorded the sexual acts involving the victim using his laptop. Kelly’s recording produced three recordings on Kelly’s laptop that contained electronic visual images of the victim engaging in child sexually abusive activity.

⁷ A digital camera typically of fairly low resolution and sophistication, either used or nominally optimized for live video transmission over the internet. Many modern laptop computers have webcams built into their casings above the screen.

Second, defendant challenges the sufficiency of the evidence concerning whether he knew or had reason to know that the victim was mentally incapacitated or physically helpless as required to prove the second and third additional circumstances for first-degree criminal sexual conduct and the additional circumstance for third-degree criminal sexual conduct. MCL 750.520b(1)(g); MCL 750.520b(1)(d)(i); MCL 750.520d(1)(c). Here, the victim testified that she only consumed one and a half drinks. The victim then got into a hot tub where she subsequently felt dizzy, nauseous, and tired, and she then lost consciousness. The victim's testimony was evidence that she was mentally incapacitated and physically helpless at the time of the sexual penetrations. MCL 750.520a(j); MCL 750.520a. Further, because defendant observed the victim's behavior both before she lost consciousness and also during her period of unconsciousness, the jury could reasonably infer that defendant knew or had reason to know that the victim was mentally incapacitated or physically helpless. *Kanaan*, 278 Mich App at 622. Further, the video recording which the jury viewed and which this Court reviewed makes clear that the victim was mentally incapacitated and/or physically helpless and at one point, when the three co-defendants were in the room with her, one of the offenders said, "she is so passed out." Therefore, the evidence, viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find that defendant knew or had reason to know that the victim was mentally incapacitated or physically helpless as required to prove the second and third additional circumstances for first-degree criminal sexual conduct and the additional circumstance for third-degree criminal sexual conduct. *Wolfe*, 440 Mich at 515-516.

On appeal, in making his argument related to the sufficiency of the evidence, defendant challenges the credibility of the victim's testimony. However, "[q]uestions of credibility are left to the trier of fact." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). While there are circumstances allowing the trial court to make judgments on the credibility of a witness under *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), a defendant must move for a new trial, and even then, questions of credibility must still be left to the jury and the evidence must still be viewed in a light most favorable to the prosecution. We find no merit in defendant's argument that this Court must make a legal determination that sufficient credible evidence was introduced. Defendant rests his argument on a series of cases that hold generally that sufficient evidence which justifies a reasonable conclusion of guilt beyond a reasonable doubt is required to support a conviction. *In re Winship*, 397 US 358, 362; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *Jackson v Virginia*, 443 US 307, 316-317; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *Wolfe*, 440 Mich at 515; *People v Lambert*, 395 Mich 296, 304; 235 NW2d 338 (1975). The rule that questions of credibility are to be left to the jury does not conflict with the principle that a reasonable conclusion of guilt beyond a reasonable doubt is required to support a conviction.

II. DOUBLE JEOPARDY

Defendant next argues that his convictions for first-degree and third-degree criminal sexual conduct violated the Double Jeopardy Clause because there was only a single sexual penetration. This issue is unpreserved and reviewed for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). As part of its protections, the Double Jeopardy Clause prohibits multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). However, defendant's convictions for first-degree and third-degree criminal sexual conduct did not violate the Double Jeopardy Clause because the evidence shows that in

fact defendant penetrated the victim multiple times, and the record does not suggest that the jurors used the same penetration to support both convictions. See *People v Matuszak*, 263 Mich App 42, 50-51; 687 NW2d 342 (2004). There was no plain error. *Meshell*, 265 Mich App at 628.

III. SCORING

Defendant also argues that the trial court erroneously scored offense variable (OV) 10, MCL 777.40 (exploitation of vulnerable victim), OV 11, MCL 777.41 (criminal sexual penetration), and prior record variable (PRV) 7, MCL 777.57 (subsequent or concurrent felony convictions). Defendant raised his claims as to OV 10 and OV 11 in his motion for resentencing, so they are preserved. MCL 769.34(10). Defendant's claim regarding PRV 7 is unpreserved. The preserved issues concerning OV 10 and OV 11 are reviewed to "determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). However, the unpreserved issue concerning PRV 7 is reviewed for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002).

OV 10 allows the trial court to assign a score of five points where "[t]he offender exploited a victim . . . who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). Here, the victim testified that she was unconscious at the time of the sexual acts and the recording of these events was consistent with her testimony. The defendants' acts were "exploitive" because they manipulated the victim for "selfish or unethical purposes" and so OV 10 was properly scored at five points.

OV 11 allows the trial court to assign a score of 50 points where "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). In scoring OV 11, the trial court must "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). However, the trial court may not "score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c). Here, defendant admitted to at least four different sexual penetrations of the victim, and two or more penetrations arose out of the first-degree criminal sexual conduct sentencing offense because they all occurred at the same place, under the same set of circumstances, and during the same course of conduct as the sentencing offenses. *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). One of the four penetrations was the basis of defendant's first-degree criminal sexual conduct sentencing offense and thus could not be used to score OV 11 (MCL 777.41(2)(c)), but at least three other sexual penetrations could be used to score OV 11. Therefore, the trial court did not abuse its discretion in scoring OV 11 at 50 points. *McLaughlin*, 258 Mich App at 671. Moreover, the video recording shows multiple penetrations by the co-defendants, and under an aiding and abetting theory, there were many additional penetrations that could have been scored. See

People v Zak, 184 Mich App 1, 13; 457 NW2d 59 (1990) (stating that “a person is guilty as an aider and abettor if he possess the same intent as the principal.”)

PRV 7 allows the trial court to assign a score of ten points where “[t]he offender has 1 subsequent or concurrent conviction.” MCL 777.57(1)(b). As discussed above, defendant’s two convictions did not violate the Double Jeopardy Clause, so both could be used to score PRV 7. Defendant has failed to show plain error. *Carines*, 460 Mich at 763.

Because the trial court correctly scored OV 10, OV 11, and PRV 7, defendant is not entitled to resentencing. See *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006) (where the Court remanded for resentencing when there was an error in scoring).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective for failing to raise a Double Jeopardy Clause challenge to defendant’s convictions and for failing to object to the scoring of PRV 7 based on that challenge. However, as discussed above, both of those claims are meritless, and defense counsel was not ineffective for failing to make meritless motions and objections.⁸ See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

IV. STANDARD 4 BRIEF ARGUMENTS

Defendant also raises several additional issues in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4. None of them warrant reversal.

A. FAIR TRIAL

Defendant argues that he was denied a fair trial because of the admission of five pieces of evidence. “To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.” *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review preserved claims of evidentiary error for an abuse of discretion, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), and unpreserved claims for plain error affecting substantial rights, *Carines*, 460 Mich at 763.

Defendant first challenges Rose’s testimony concerning what the victim texted⁹ and told her the morning after the incident. Defendant objected to text message “I need help,” on hearsay

⁸ Defendant also alludes to other possible claims of ineffective assistance, but defendant does not offer any facts specific to these claims of ineffective assistance of counsel, and “defendant has the burden of establishing the factual predicate for his claim.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

⁹ “Texting” refers to the transmission of a written text message between cellular telephones. Such messages are often very short, either because of character limitations imposed by service

grounds, but otherwise failed to preserve this issue. *Aldrich*, 246 Mich App at 113. Defendant claims that the testimony was inadmissible under MRE 401, 402, and 403, and also hearsay. However, Rose's testimony concerning what the victim texted and told her was relevant because it explained how and why Rose came into contact with the victim and made the existence of Rose's observation of the victim's injuries and mental state more probable than it would have been without that explanation. MRE 401. Also, there was no danger that the victim's statements were unfairly prejudicial because those statements were duplicative to the victim's testimony at trial. MRE 403. Further, the victim's statements were not hearsay because they were not offered to prove the truth of the matter asserted because they were offered to show why Pearson had the opportunity to observe the victim. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (explaining that a statement offered to show why police acted in the way they did is not hearsay); MRE 801(c). The trial court did not abuse its discretion in admitting the text "I need help" over defendant's hearsay objection, *Lukity*, 460 Mich at 488, and there was no plain error in regard to the remainder of the statements. *Carines*, 460 Mich at 763.

The second piece of evidence defendant challenges is the victim's written statement to the police. However, defense counsel stated that he had "no objection" to the admission of the statement at trial. Therefore, he has waived this argument. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, defendant does not refer us to anything in that statement beyond that which was testified to by the police officers, the nurse who conducted the physical examination or the victim herself. To the degree admission of the statement might have constituted error had there been an objection, we would conclude that it was harmless given the other testimony and the actual recording of the crime on video.

The third piece of evidence defendant challenges is that defendant had been involved in the adult film industry, which defendant claims the prosecutor raised during voir dire. However, defense counsel was actually the first to raise that fact in voir dire, and thus, even if there were error present, reversal would not be required because defendant would have contributed to the error by plan or negligence. See *Genna v Jackson*, 286 Mich App 413, 422; 781 NW2d 124 (2009) (where defense counsel questioned witnesses about the topic of settlement negotiations and thereby extinguished the availability for reversal on the grounds of settlement negotiations being admitted at trial). Defendant has failed to show plain error. *Carines*, 460 Mich at 763. Additionally, defendant used this information as part of his defense to explain why he was purportedly angry about Kelly recording the sex acts.

The fourth piece of evidence challenged by defendant is defendant's testimony in response to the prosecutor's question of whether defendant thought that he was a moral person based on his work in the adult film industry. When defendant was asked by defense counsel if he had a problem working in the adult film industry, defendant stated that "there's that moral thing that eats inside of you." Therefore, defendant opened the door to the issue concerning his character and morals in regard to his work in the adult film industry during his own direct examination, and a prosecutor may always cross-examine the defendant regarding character once

providers or because many cellular telephones do not have full keyboards, making lengthy compositions difficult.

the defendant “opens the door.” MRE 404(a)(1). While it would normally be improper for the prosecutor to ask questions about defendant’s morality—as it has no business in a criminal case, the facts as stated above would allow the question to be asked by the prosecutor. See *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999) (where defendant opens a door by testifying about being a role model and allows the prosecutor to rebut and challenge it). Defendant has failed to show plain error. *Carines*, 460 Mich at 763.

The fifth piece of evidence defendant challenges is defendant’s partial response that “I never gave a testi--” to the prosecutor’s question whether “[t]his is the first day we hear what your version of the events is about this night.” Defendant argues that the prosecutor’s question improperly introduced his partial statement that “I never gave a testi,” which defendant claims was irrelevant and highly prejudicial under MRE 401, 402, and 403, and inadmissible because it violated defendant’s constitutional right against compelled self-incrimination. However, this statement was properly elicited to impeach defendant based on his pre-custodial interrogation, pre-*Miranda*¹⁰ silence. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). Further, defendant’s silence was relevant to his credibility because he failed to report Kelly’s illegal recording of the incident to the police. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003) (explaining that “a prosecutor may comment on a defendant’s failure to report a crime when reporting the crime would have been natural if the defendant’s version of the events were true”). Defendant has failed to show plain error. *Carines*, 460 Mich at 763.

B. PROSECUTORIAL MISCONDUCT

Defendant argues a series of claims of prosecutorial misconduct in regard to 11 separate statements the prosecutor made at trial. We review defendant’s unpreserved claims for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763.

The first challenged statement was made by the prosecutor during voir dire: “[y]ou’re going to actually see the video representation, the video acts of what the Defendants did in this matter. It’s graphic, it’s deplorable and, in my opinion, criminal.” The prosecutor’s comments, in context, were designed to inform the jurors of the nature of the case they were about to hear, and to inquire into whether they could properly consider the evidence. However, such comments are improper and the opinions of attorneys are not for a jury to hear. While the prosecutor’s statement was improper, defendant has failed to show that the outcome would have been different if not for the prosecutor’s statement. *Carines*, 460 Mich at 763.

Next defendant argues that the prosecutor’s comment during opening statement: “I think once you see and hear and feel this evidence, it’s going to become very clear to you this is very immoral, this is very despicable, and this is very illegal” was improper. What may be considered moral and what may be considered legal can be two very different things, and questions of morality do not belong in a criminal case. The prosecutor’s statements, in context, impermissibly appealed the jurors’ civic duty and sympathies, *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411

¹⁰ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(2001), and also denigrated defendant, *Bahoda*, 448 Mich at 283. However, reversal is not required because any prejudice could have been cured by a timely instruction. *Watson*, 245 Mich App at 586. Further, the jury was instructed before their deliberations that the “lawyers’ statements and arguments are not evidence. They are only meant to help you understand the evidence and each side’s legal theories.” And, “[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has failed to show outcome-determinative prejudice. *Carines*, 460 Mich at 763.

The third challenged statement involves a series of questions the prosecutor asked the victim concerning her physical examination. The prosecutor did not interject issues broader than the defendant’s guilt or innocence, *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), and the prosecutor did not appeal to the jurors’ sympathies, *Watson*, 245 Mich App at 591. Defendant has thus failed to show plain error. *Carines*, 460 Mich at 763.

The fourth challenged statement was made by the prosecutor at the very beginning of his closing argument: “I know it was hard for you, because it was hard for me. But thank you for watching what you watched [the recording of the incident].” While this statement clearly has no place in a criminal trial because it is irrelevant as to whether watching the recording was difficult for the prosecutor, it did not impermissibly appeal to the jurors’ civic duty, *Thomas*, 260 Mich App at 455, or sympathies, *Watson*, 245 Mich App at 591, or argue facts not in evidence, *Watson*, 245 Mich App at 588, or denigrate defendant, *Bahoda*, 448 Mich at 283. It was a continuation of a theme introduced by defense counsel in voir dire that while some of the jurors may find the case difficult, the jurors’ duty was to determine defendant’s guilt or innocence based on the evidence. Defendant has failed to show plain error. *Carines*, 460 Mich at 763.

The fifth and sixth challenged statements were a series of three statements made by the prosecutor during his closing argument that “[u]nlike many cases, you were allowed to see the crime occur in front of you”; “you’ve had the ability to see this crime occur in front of your eyes”; and that defendant and Jordan “knew full well that they were being videotaped.” However, the statements were a part of the prosecutor’s argument from the facts, *Bahoda*, 448 Mich at 282, and defendant fails to show plain error, *Carines*, 460 Mich at 763.

The seventh prosecutorial statement was made during rebuttal closing argument, stating that Jordan lied because Jordan testified that he had not kissed the victim’s neck, and yet Jordan’s DNA was found on the victim’s neck. The prosecutor permissibly argued that Jordan lied based on an inference from the evidence, *Bahoda*, 448 Mich at 282, and defendant has failed to show plain error. *Carines*, 460 Mich at 763.

The eighth challenged statement was also made by the prosecutor during his rebuttal closing argument, stating that the defense expert’s testimony was not credible because he could not tell the jury about the drug Ambien. The prosecutor permissibly inferred that the defense expert was not a credible expert witness because he could not discuss a common drug like Ambien, *Bahoda*, 448 Mich at 282, and defendant has failed to show plain error. *Carines*, 460 Mich at 763.

The ninth challenged statement was made by the prosecutor during his rebuttal closing argument, stating that the defense expert's testimony was not credible because the defense expert was not given access to Jordan's statement to the police concerning the number of drinks the victim consumed. This was a reasonable argument for the prosecutor to make based on the evidence brought into trial. The expert admitted to not having access to the statement and therefore, it was a proper argument for the prosecutor to make. *Bahoda*, 448 Mich at 282.

The tenth challenged statement was made by the prosecutor during his rebuttal closing argument, stating that the victim's testimony was credible because otherwise, she would not have gone through the difficulties of this case. The prosecutor properly argued the facts and reasonable inferences drawn there from, and defendant has not shown plain error. *Bahoda*, 448 Mich at 282; *Carines*, 460 Mich at 763.

Finally, the eleventh challenged statement was made by the prosecutor during his rebuttal closing argument, arguing that defense counsel intentionally left out elements of the consent jury instruction during his closing argument when the prosecutor stated, "I know why he wouldn't want to read that to you. What else did he leave out?" We agree that the prosecutor's argument improperly suggested that defense counsel attempted to mislead the jury, *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010), which denigrated defense counsel, *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). However, reversal is not required because any prejudice could have been cured by a timely instruction, *Watson*, 245 Mich App at 586, and the jury presumably followed the instruction that the prosecutor's arguments were not evidence, *Abraham*, 256 Mich App at 279. Defendant has failed to show prejudice. *Carines*, 460 Mich at 763.

Finally, defendant argues that cumulatively the instances of the prosecutor's misconduct are error requiring reversal. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. We review a cumulative error argument to determine if "the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Here, as discussed above, there was sufficient evidence of defendant's guilt. The victim testified as to what she remembered, the jury watched the videotape of the incident, defendant admitted to penetrating the victim several times, and medical evidence supported that she suffered injuries. And, none of the errors we have found directly concerned the admissibility or credibility of that evidence. Further, because any prejudice from the errors here was presumably cured by the trial court's instruction to the jury that the "lawyers' statements and arguments are not evidence," the combined effect of the errors did not deny defendant a fair trial. *Hill*, 257 Mich App at 152.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause