STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS EDWARD SKALUBA,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 349660
Alpena Circuit Court
LC No. 17-008080-FC

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as I believe there were several errors which, when viewed cumulatively, require reversal. Absent reversal, I would order the parties to file supplemental briefs concerning the proportionality of defendant's sentence.

I. CONVICTION

I would reverse defendant's convictions based on cumulative error. See *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999) ("[T]he cumulative effect of a number of minor errors may in some cases amount to error requiring reversal[.]").

First, the trial court, over defense objections, allowed two lay witnesses to offer testimony about their personal experience of the effect of Xanax when combined with alcohol and one as to his belief that Xanax clears the body quickly. The prosecution claimed that this was probative of the effect of Xanax on the complainants and to the half-life of the drug. However, this testimony lacked the foundation necessary for it to have any probative value and it had the potential to mislead the jury. There was no testimony by these witnesses describing the amount of Xanax they took, the amount of alcohol they drank or the amount of other drugs—legal and illegal—they had consumed, let alone any expertise in the half-life of the drug.

Second, in his closing argument the prosecution misrepresented the evidence by asserting that defendant had kept the complainants' underwear as "trophies" when there was no evidence that he either took the underwear or that he kept it. To the contrary, at the preliminary examination one the complainants testified that she found her underwear in her bag and another witness testified

that a different young man attending the party was later seen with the second complainant's underwear. Thus, the prosecutor committed misconduct by arguing facts not supported by the evidence. See *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Third, in his closing argument the prosecutor made a civic duty argument that, particularly in the context of this case, was highly prejudicial. He told the jury:

> When you listened to [LD] she told you that she had a hard time coming forward because she thought, it's sad, that sexual assaults are not taken seriously. Today you have an opportunity to set an example. Not only for her, not only for [EK], but all, for all the victims by convicting [defendant], and telling young girls and victims that it's not okay to be taken seriously [sic].

As the majority points out, the prosecutor followed this statement by saying, "Now you have to do that only on the facts and circumstances in this case. You have to do it only with the information that you have," which the majority concludes cured any prejudice. But, if in fact the prosecutor understood that the jury must decide the case only on the evidence presented, what proper reason could he have had to make the first statement which called for a conviction for reasons other than the record evidence. And as noted below, there was substantial community outrage when other alleged assailants were allowed to plead to relatively minor crimes and received virtually no punishment, thereby leaving fertile ground for an improper civic duty argument. See *People v Lane*, 308 Mich App 38, 66; 862 NW2d 446 (2014).

In light of the cumulative effect of these errors, I would remand for a new trial.

II. SENTENCE

Defendant's 16-year minimum term fell within the guidelines and appellate counsel has not sought review of that sentence given our decision in *People v Schrauben*, 314 Mich App 181; 886 NW2d 173 (2016), that MCL 769.34(10) all but bars a challenge to a within-guideline sentences absent a decisive guideline scoring error. However, the Supreme Court has very recently granted leave in two cases to consider whether the requirement that we affirm an in-guidelines sentence "is consistent with the Sixth Amendment, the due-process right to appellate review, and *People v Lockridge*, 498 Mich 358 (2015)." See *People v Stewart*, ___ Mich ___ (2021) (Docket No. 162497); *People v Posey*, ___ Mich ___ (2021) (Docket No. 162373). If the Supreme Court holds that within-guidelines sentences may be reviewed for proportionality then the sentence in this case deserves close review and so I would direct the parties to file supplemental briefs on that issue.[1]

[1] We should not forget that defendant's punishment will not end upon his release from prison, which will presumably occur sometime after June 2035. He will thereafter be subject to the many lifetime limitations on Tier III sex offenders including the requirement that he wear a GPS tether for the rest of his life, as well as limitations relating to where he lives, where he works, what jobs

Defendant was 19 years old at the time of the offenses. He had no prior criminal or juvenile record. And the crimes for which he was convicted, while wholly inexcusable, did not occur in a vacuum. It is clear from the testimony introduced by the prosecution that the partygoers, including defendant and the complainants were nearly all in their teens and that despite being underage they consumed prodigious amounts of alcohol—far more than would render them too drunk to drive—in a very short period of time. This was encouraged by several drinking games that were played including "beer pong" and "waterfall." Sex among minors was going on in various bedrooms.[2] Physical fights occurred. In other words, the environment was one in which normal behavioral restraints were largely, if not wholly, disregarded. This cannot not excuse the cruel mistreatment of the two young women assaulted. However, the context in which the crimes occurred is relevant to a review of the minimum 16-year minimum prison term imposed on a first offender who had just graduated high school at the time of the crimes.

Further, in addition to defendant, two other young men from the party were prosecuted, though their fates were very different from defendant's. The record reveals that one, Shane Dawson, age 21 at the time of the party, was accused by LD of forcibly using his finger to penetrate her vagina while she was incapacitated. In addition, he was the host of the party, invited minors and allowed them to drink alcohol (much of which he provided) and to bring additional alcohol and various illegal drugs. During the party that he hosted, he snorted Adderall, got into a physical fight with an attendee and had sex, presumably consensual, with two other high school girls in addition to the allegations of sexual assault by LD. In exchange for his testimony, the prosecutor agreed not to use his proffer statement against him and he was ultimately charged only with furnishing alcohol to a minor, to which he pleaded guilty and received a deferred sentence. The second, Thompson Hein, age 16 at the time of the party, was initially charged with criminal sexual conduct. According to LD, she woke up in a bedroom to find Hein naked and straddling her chest with his genitals in her face. She testified that Hein, in addition to defendant, digitally penetrated her. And Hein was the individual that had been seen in possession of one of the victim's underwear, not the defendant as the prosecutor told the jury. Moreover, he admitted that he destroyed evidence by deleting all his texts in which there was communication about the party and what occurred there. He was, however, allowed to plead guilty to one count of felonious assault under the Holmes Youthful Trainee Act and received a 90-day sentence to be served on weekends.[3]

Notably, after Dawson and Hein were sentenced, but before defendant was sentenced, there was substantial community protest against the very lenient sentences given to Dawson and Hein.[4]

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he may seek and lifetime SORA registration reporting requirements (violation of which may result in imprisonment).

[2] One witness testified that in a text to one of the complainants the following day she wrote that "everyone fucked everyone" and that it was an "orgy."

[3] During her victim statement at sentencing, LD expressed that she had given up hope for justice because "two, three men involved in this case basically walked away from this."

[4] Citizens concerned about the light sentences imposed on Dawson and Hein held a demonstration outside city hall. Signs included messages such as "No More Plea Deals" and "I'm Worth More

These two young men who were accused of forcing sex upon LD were essentially permitted to go on with their lives. By contrast, defendant will be imprisoned for at least 16 years before the parole board may even consider whether release would be proper.

I would vacate defendant's conviction and remand for a new trial. Alternatively, I would direct the parties to file briefs as to the proportionality of the sentence.

/s/ Douglas B. Shapiro

Than 90 days." (Capitalization omitted). After learning of Hein's sentence, the mother of one complainant said, "We're totally getting screwed. It's like she's getting raped all over again." A friend of a complainant said, "How Alpena is handling this is downright sickening." Donnelly, *Alleged sexual assaults in Alpena stir protests over punishments*, The Detroit News (November 28, 2018) <https://www.detroitnews.com/story/news/local/michigan/2018/11/28/victims-family-alpena-upset-punishment-sexual assaults-parties/1994118002> (accessed November 8, 2021).