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UNPUBLISHED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.

PER CURIAM.

Defendant, Nicholas Edward Skaluba, appeals as of right his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (sexual penetration occurring under circumstances involving the commission of another felony), and two counts of delivering a controlled substance for purposes of committing criminal sexual conduct, MCL 333.7401a. The trial court imposed concurrent prison sentences of 16 years to life for each CSC-I conviction and 6 to 20 years for each drug-delivery conviction. We affirm.

I. FACTUAL BACKGROUND

Two parties took place at the home of 21-year-old Shane Dawson in Alpena, Michigan, in July 2016—one on the evening of July 27 going into July 28 (the "first party") and one on the evening of July 28 going into July 29 (the "second party"). Activities such as underaged drinking, illegal substance use, and sex transpired at both parties. The prosecutor presented evidence that defendant, 19 years old at the time, sexually penetrated EK, who was 18 or 19 years old, during the first party, without her consent and after surreptitiously drugging her with Xanax. The prosecutor also presented evidence that defendant sexually penetrated LD, who was 16 years old, during the second party, without her consent and after surreptitiously drugging her with Xanax.

The evidence included incriminating texts by defendant to the two victims addressing the fact that they had had sex, eyewitness testimony that defendant used Xanax himself at the first

party[1] and admitted to giving EK Xanax for the purpose of having sex with her, and that he plied LD with drinks at the second party, after which she passed out and defendant carried her body to a bed. LD was later seen blinking a lot, acting confused, and wearing only a bra, while defendant was seen naked. A witness heard defendant talking about Xanax at the second party.[2] At the time they were tested, drug screens for EK and LD were negative for Xanax, and evidence was admitted regarding the half-life of the drug.[3] Both women testified that they felt uncharacteristically intoxicated after consuming alcoholic drinks provided by defendant, and that they noticed discomfort in their genital areas after waking up. Testimony indicated that the women were incapacitated and could not consent to sex. The prosecutor presented other-acts testimony from another young woman, NS, who testified that she had been every close friends with defendant, but that in February 2016, he made her a drink, after which she blacked out and he penetrated her while she was unconscious.[4] Based on the way she felt after consuming the drink, NS believed that defendant had put something in her drink.

Defendant testified at trial and claimed that he did not drug anyone with Xanax and did not have sex with EK, LD, or NS. He claimed that after the first party, he sent text messages to EK about having had sex with her because he was under the mistaken impression that the two had, in fact, had sex. He claimed that after the second party, he sent text messages to LD about having had sex with her because he thought he was texting a different girl.

As previously noted, defendant was convicted of two counts of CSC-I and two counts of delivering a controlled substance for purposes of committing criminal sexual conduct. He now appeals as of right.

II. ANALYSIS

A. *BRADY*[5] VIOLATION

Defendant first contends that the prosecutor committed a *Brady* violation by failing to turn over evidence that the cell phones of Sawyer Hein (Sawyer) and Thompson Hein (Thompson), friends of defendant, had been "wiped," according to a telephone analyst. He further contends that

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[1] EK walked into an upstairs room at one point and saw defendant, Dawson, and Thompson Hein with a container of pills. She recalled them talking about "Xanax or Aderall," and they were "mashing up something on [a] book." Another witness provided similar testimony. Dawson testified that at his parties, drinking occurred, as well as Adderall and Xanax usage. Thompson testified that he used Xanax with defendant.

[2] Defendant also made a joke to Sawyer Hein the morning after the second party about giving Xanax to girls in order to get them to sleep with him.

[3] EK was tested for Xanax "some five days later," and the result was negative.

[4] Defendant was not charged in connection with the allegations involving NS.

[5] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

the trial court should have granted his motion for a mistrial in connection with this issue. We disagree.

In general, a *Brady* issue is a question of law reviewed de novo. *People v Dimambro*, 318 Mich App 204, 212; 897 NW2d 233 (2016). Underlying factual findings by the trial court are reviewed for clear error. *Id*. This Court reviews for an abuse of discretion a trial court's decision to deny a motion for a mistrial. *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id*.

Sawyer and Thompson both testified that a three-way text exchange occurred between them and defendant wherein defendant "joked" about giving a woman Xanax in order to have sex with her. According to the prosecutor, an extraction analysis revealed that the Heins' phones had been "wiped" and that the text exchange was not available. The prosecutor admitted that, due to an inadvertent error, this was not communicated to the defense before trial. Defendant asserts that a *Brady* violation occurred and that the trial court should have granted his motion for a mistrial because defense counsel would have questioned Sawyer and Thompson differently if counsel had known that they deleted the text messages.

A *Brady* violation occurs when "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) [that,] viewed in its totality, is material." *People v Chenault*, 495 Mich 142, 155; 845 NW2d 731 (2014). "Evidence is favorable to the defense when it is either exculpatory or impeaching," and whether the prosecutor acted in good faith is irrelevant. *Id*. at 150. "To establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted). The question of materiality involves ascertaining whether "the defendant received a trial that resulted in a verdict worthy of confidence." *Id*. at 157-159. A prosecutor has a duty to learn of information known to others acting on behalf of the government, including the police. *Dimambro*, 318 Mich App at 213.

First, there was clearly no error regarding material impeachment evidence in regard to Sawyer's phone. Sawyer testified that he did not have the text messages at issue because he "factory reset the phone because [he] gave it to [his] mother" when getting a new phone. Defense counsel had an opportunity to explore the issue of this factory reset in his cross-examination. And in fact, defense counsel asked Sawyer whether he was willfully "trying to hide evidence." Sawyer answered, "No, not at all."

Similarly, defendant has failed to demonstrate that evidence related to Thompson's phone was material for impeachment purposes. The following colloquy occurred between defense counsel and Thompson:

> *Q*. The text message conversation between you, your brother, and [defendant]. When you met with the prosecution as part of your proffer back in February of 2018 you were *trying to recover* those text messages at that point.
>
> *A*. Correct.

Q. Okay, did you ever produce those text messages [for] the prosecution?

A. I did not.

Counsel elicited testimony showing that Thompson attempted to "recover" the messages, but they were not produced for the prosecution. The clear implication was that they were deleted. Accordingly, there is no reasonable probability that additional cross-examination of Thompson regarding the deletion would have led to a different outcome. *Chenault*, 495 Mich at 150. Indeed, the trial court noted during its denial of the motion for a mistrial that "everybody started this trial with the assumption that there was no non-testimonial evidence of the defendant's alleged texts regarding his plan to drug girls for sex. And we're all still at the same place."

Defendant also argues that if he had obtained the information about the analysis before trial, the defense could have sent the phones for an independent analysis. But the defense could have sought an analysis on their own from the start. And the prosecutor was not constitutionally obligated to help the defense develop potentially exculpatory evidence by seeking any additional forensic analyses. See, e.g., *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006). Moreover, defendant has presented no evidence to establish that such an independent analysis would have resulted in any material, exculpatory information being revealed.

Under all the circumstances, no *Brady* violation occurred, and the trial court did not abuse its discretion by denying the motion for a mistrial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next challenges testimony provided by prosecution expert Geoffrey French, who testified that even though LD's blood test was negative for Xanax, the drug could have been eliminated from her system by the time her blood was drawn in the early morning hours of July 30, 2016. Specifically, defendant argues that defense counsel was ineffective for failing to object to French's qualifications to provide testimony relating to the half-life of Xanax. We disagree.

To obtain relief on the basis of ineffective assistance of counsel, a party "must show that counsel's performance fell short of [an] . . . objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the . . . trial would have been different." *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015) (quotation marks, citation, and brackets omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted). Because no *Ginther*[6] hearing took place, our review is limited to the existing record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).[7]

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[7] We decline to revisit our earlier decision to deny defendant's motion for a remand for a *Ginther* hearing.

At trial, the court qualified French as an expert in "forensic toxicology." Defense counsel did not object to this qualification but stated that he might raise an objection during the course of French's testimony if French "w[a]nder[ed] off in [a] different direction." But counsel did not later raise such an objection. On appeal, defendant does not dispute that French was qualified to testify about the detection level for the Xanax testing and about LD's test results. He contends, however, that French was not qualified to speak about the half-life of Xanax and how long it remains in a person's system.

MRE 702 states:

> 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.

French testified that he had been "a forensic scientist in the [Michigan State Police Lansing Forensic Laboratory] toxicology unit for almost twenty five years." He stated that he had been the supervisor of the toxicology unit since 2011. He noted that he had two Bachelor's degrees, one in criminal justice and one in forensic science, and had been a member of the Society of Forensic Toxicologists for approximately 20 years. French stated that his laboratory performed approximately 7,000 drug tests a year. He testified that he was familiar with the half-life of Xanax, and he spoke about "the literature" pertaining to the subject. He also spoke about what "authorities" had calculated in terms of the half-life of Xanax, and he referred to a book called "Disposition of Toxic Drugs and Chemicals in Man." He also referred to "dosing studies."

Even though the defense expert, Charles Simpson, testified that a peak blood level following a typical, one-milligram dose of Xanax was approximately 408 nanograms of Xanax per milliliter of blood, French stated that only about 20% of the Xanax testing in his laboratory resulted in levels above 100 nanograms per milliliter of blood. French noted that he was familiar with Federal Drug Administration literature regarding Xanax dosing and that this literature was in accord with the notion that a one-milligram dose would reach a peak level of approximately *20* nanograms per milliliter of blood. French then referred to another authority called "Winek's Drug and Chemical Blood Level Data," which refers to the therapeutic level of Xanax being approximately 25 to 102 nanograms per milliliter of blood. French relied on the Winek document in stating that 400 nanograms per milliliter of blood was actually a potentially lethal level. French stated that he saw tests in the range of 122 to 390 nanograms per milliliter of blood in his laboratory but that these were generally from "deceased individuals."

Given this testimony, defendant has not established that any objections to the testimony in question would have been sustained, because French provided a foundation for his conclusion. Moreover, defense counsel extensively questioned French in regard to his qualifications and the scientific basis underlying his opinion. Therefore, defendant has not shown that counsel was ineffective for failing to object or that such an objection would have resulted in the reasonable probability of a different outcome. *Ackley*, 497 Mich at 389. "Failing to advance a meritless

argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant additionally contends that counsel rendered ineffective assistance by committing a discovery violation in connection with Simpson's testimony. It is true that defense counsel erred by failing to follow MCR 6.201(A)(3), which states, with regard to expert witnesses, that a party must, upon request, provide other parties with "either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion[.]" The court concluded that Simpson could testify in general terms about how Xanax performs in a person's system but, because of the discovery violation, could not make the blanket statement that LD did not have Xanax in her system. The court noted that defense counsel could use tailored hypotheticals.

While defense counsel's omission resulted in a limitation being placed on Simpson's testimony, defendant has not established the requisite prejudice. See *Ackley*, 497 Mich at 389. Indeed, Simpson testified extensively about his opinion regarding what the blood-test results would be in circumstances applicable to this case, i.e., in circumstances involving a healthy, 16-year-old girl ingesting typical doses of Xanax and having her blood tested a particular number of hours later. In other words, defense counsel gave Simpson hypotheticals that matched the circumstances of the present case, even though the trial court disallowed Simpson from saying outright that LD did not have Xanax in her system. The jurors were given the information the defense wanted them to be given, just in a different form. Defendant has not established a reasonable probability that a different outcome would have resulted if counsel had complied with MCR 6.201(A)(3). *Id.*

C. LAY-WITNESS TESTIMONY REGARDING XANAX

Additionally, defendant contends that the trial court should not have allowed Sawyer or John Mack, defendant's friend, to testify about their experiences with using Xanax and alcohol together because the testimony was irrelevant. He also contends that the court should not have allowed Mack to testify about *why* he used Xanax. Even if this testimony was irrelevant, we conclude that any error in allowing it was not outcome-determinative.

This Court reviews for an abuse of discretion a trial court's decision regarding the admission of evidence. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). The challenge to Mack's testimony about his experience using Xanax and alcohol together is not preserved.[8] This Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain-error doctrine, reversal is warranted if a "clear or obvious" error occurred that "affected the outcome of the lower court proceedings." *Id.* And even if this standard is satisfied,

[8] Defendant did preserve the challenge to Mack's testimony about why he used Xanax.

> an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id*. at 763-764 (citation, quotation marks, and brackets omitted).]

Sawyer testified that he had once used alcohol and Xanax together and said that he was "a little bit fuzzier after than [he] would normally have been having only drank [sic]." He said the combination was "more intoxicat[ing] than normal" and that he "had trouble remembering" things until people spoke with him about what had happened while he was under the influence. The trial court overruled defense counsel's objections to the testimony, stating, "I think there was some relevance with regard to the combination of Xanax and alcohol." The court stated that counsel's objection went more to weight than admissibility.

Mack testified, without objection, that he had used Xanax with alcohol "about five times" and that when he did, he "would not remember a single thing from when they took effect," "[b]ecause [of] the combination of depressants."

On appeal, defendant objects to the above testimony *solely* on grounds of relevance. He cites *only* MRE 401 in support of his argument. MRE 401 states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence is admissible pursuant to MRE 401 if it is material and probative. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995). Materiality "is the requirement that the proffered evidence be related to any fact *that is of consequence* to the action." *Id*. (quotation marks and citation omitted). "Materiality, however, does not mean that the evidence must be directed at an element of a crime or an applicable defense. A material fact is one that is in issue in the sense that it is within the range of litigated matters in controversy." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000) (quotation marks and citation omitted).

EK and LD were drinking alcohol at the parties, and whether EK or LD had ingested Xanax was at issue at trial. They each described feeling different than they had at other times when only drinking alcohol. The experiences of Sawyer and Mack when taking alcohol and Xanax together were relevant to a determination regarding whether EK or LD had been given Xanax. Defense counsel was free to argue that the testimony should not be given much weight because drugs can affect different people differently, but it is difficult to conclude that the trial court abused its discretion or committed clear error on pure relevancy grounds. And as for Sawyer's testimony, "a preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) (quotation marks and citation omitted). For Mack's testimony as well, reversal would require an outcome-determinative error. *Carines*, 460 Mich at 763. French stated that alcohol and Xanax have a synergistic effect, meaning that the side effects of each "may compound one another." Simpson said that Xanax is a sedative and alcohol is a depressant and that they have a synergistic effect. He admitted that there is a considerable risk with mixing alcohol and benzodiazepines and that Xanax can cause drowsiness, confusion, muscle weakness, and other things. Simpson said, "You should not drink on benzodiazepines." He also said that the "hangover effect" from Xanax feels different

from an alcohol hangover. A medical doctor testified at trial that combining alcohol and Xanax was a recipe for "[t]rouble." The doctor testified that the combination could suppress a person's "mind" and even lead to death. Given the testimony by other witnesses that using alcohol and Xanax together could compound the effects of each, the testimony from Sawyer and Mack about which defendant complains was not outcome-determinative even assuming that it was improperly admitted.

Defendant also takes issue with Mack's testimony that he took Xanax while on probation because he learned from his abnormal-psychology course that it "gets out of your system faster than other drugs." He gave this testimony in response to a question about why he took Xanax. Upon defense counsel's objection that Mack was giving expert testimony without being an expert, the trial court said, "I mean he's testifying to why he did it. Now he may or may not be right about any of those things. He's not been qualified as an expert." The court said that Mack could be wrong and that defense counsel could cross-examine him about the matter.

Although defendant argues on appeal that Mack's testimony was improper expert testimony, he does not develop this theory with any legal authorities. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2 342 (2004) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.") (quotation marks and citation omitted; alteration in original). Nonetheless, the trial court stated that Mack, in giving the testimony, was explaining why he took Xanax while on probation. Defendant contends that the reason Mack took Xanax was not relevant, under MRE 401, to any issue at trial, and this is true. However, even if the trial court should have disallowed this testimony on relevancy grounds, any error was harmless, *Lukity*, 460 Mich at 496, given the trial court's explicit statement that Mack was not "an expert" and "could be completely . . . wrong," and in light of the fact that qualified experts later specifically testified about the elimination rate of Xanax.

D. PROSECUTORIAL ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that the prosecutor made three inappropriate comments during his closing arguments, and that defendant's counsel should have, but failed to object. Defendant claims that the prosecutor's comments constituted plain error requiring reversal, defense counsel rendered ineffective assistance, and that the cumulative errors warrant a new trial. We disagree.

Defendant first takes issue with the following argument made in closing by the prosecutor:

> When we started I told you this case was about the hunter and his prey. The defendant was the hunter and the women were his prey. And I told you he's the worst kind of hunter. Because he doesn't hunt for the food. He hunts for the horn. The horns in this case were the underwear. In both instances he got his trophy.
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> In both instances you had young girls that ended up being sexually assaulted. He had the underwear. He had his trophy. He bragged about it to other individuals. This is an individual who lacks respect for other individuals. He lacks respect for women in particular. He doesn't[] respect them. He doesn't respect their body [sic].

Defendant contends that the prosecutor should not have stated that defendant had gotten EK's and LD's underwear because there was no evidence that defendant ever had the underwear.

EK testified that when she urinated for the first time after the first party, she noticed that she did not have underwear on. LD testified that she, a friend, defendant, and Thompson all looked for her underwear on the night of the second party but could not find them. The morning after the second party, LD noticed that she was wearing her friend's underwear.

"Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). A prosecutor "is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case[.]" *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). "The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Id*. The pertinent question is whether the prosecutor's remarks, viewed in context, tended to deprive the defendant of a fair and impartial trial. See *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The plain-error standard involves an error that is clear or obvious. *Carines*, 460 Mich at 763. Given the testimony *at trial* that neither EK nor LD had her underwear, and given the evidence that defendant sexually penetrated them after giving them Xanax, it is difficult to conclude that the prosecutor's argument was a clear or obvious error—at least when the trial testimony and evidence is viewed in isolation—because defendant would likely have had possession of the underwear at some point in time. Defendant, however, contends that the prosecutor should have known better than to make the "underwear" argument, because the issue was explored at the preliminary examination. At the preliminary examination, EK stated that she eventually found her underwear "in [her] bag." She said that she did not know if she had put them in there. As for LD's underwear, Dawson testified at the preliminary examination that he heard that Thompson "wore [LD's] underwear home the next day on his head."

It does appear that the prosecutor, despite this testimony from the preliminary examination, was attempting to mislead the jury into thinking that defendant kept the underwear of EK and LD. But even if this was a clear or obvious error on the part of the prosecutor, reversal under the plain-error standard requires an effect on the outcome of the case. *Id*. We conclude that the brief comments about the underwear did not affect the outcome of the proceedings in light of all the other evidence presented. In addition, the court instructed the jurors that "[t]he lawyer's statements and arguments are not evidence" and that they "should only accept the things the lawyers say that are supported by the evidence, or by [the jurors'] own common sense and general knowledge." "Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

With respect to defendant's ineffective assistance of counsel argument, even if defense counsel's failure to object fell below an objective standard of reasonableness, defendant must also show a reasonable probability of a different outcome. *Ackley*, 497 Mich 389. Based on the evidence properly admitted at trial, it is not reasonably probable that an objection to the prosecution's underwear argument would have led to a different outcome.

Defendant also takes issue with the prosecutor's statement that NS "still remembers being raped when she was incapacitated." He contends that this was improper because NS had, in fact, blacked out during the supposed incident in question. But, as noted, a prosecutor's remarks must be viewed in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The context of the statement by the prosecutor was:

> Now [NS] can't tell you exactly how [defendant] penetrated her. But as a female she can tell you what she felt. As a female she can tell you that she knows that she had sex. And it wasn't sex that she consented to.
>
> * * *
>
> [NS's] story as to what happened is eerily similar to [EK's] and [LD's]. And although she was drinking more alcohol, and it was, you know, a harder alcohol potentially the fact is she still remembers being raped when she was incapacitated. That's her take on it. She knows how she felt the next morning.

The prosecutor's wording was inartful, but he made it adequately clear that NS believed that she had been sexually penetrated on the basis of how she felt upon waking. When the challenged comment is viewed in context, it becomes apparent that there was no clear or obvious error, and the failure to object was inconsequential. *Carines*, 460 Mich at 763; *Ackley*, 497 Mich at 389.[9]

Defendant also takes issue with this statement by the prosecutor:

> Last thing I want to leave you with is this. 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].

Defendant contends that the prosecutor, in making this statement, was improperly appealing to the jurors' sense of civic duty. It is true that a prosecutor may not "urge the jury to convict as part of its civic duty." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). However, once again, context is important. Immediately before making the comments block-quoted above, the prosecutor spoke about how difficult it had been for NS and EK to come forward about defendant's actions. Also, the challenged comments directly related to LD's testimony that she hesitated to report the assault because she knew that "typically sexual assault cases aren't taken very seriously in our society." Most importantly, immediately after making the block-quoted comments, the prosecutor stated, "*Now you have to do that only on the facts and circumstances in this case. You*

[9] Even if a defendant fails to satisfy the prejudice prong when complaining about plain error, he or she may still be able to establish the prejudice prong of an ineffective assistance claim. *People v Randolph*, 502 Mich 1, 14-15; 917 NW 2d 249 (2018). In this matter, defendant has failed to show either form of prejudice.

have to do it only with the information that you have. But I just ask you to look at the emotion that you saw from those girls." (Emphasis added.)

Defense counsel responded to all of these allegations during closing arguments, arguing that a witness testified that defendant was not acting predatorily at the parties, that NS passed out as a result of mixing large amounts of alcohol and marijuana, and that this case was distinguishable from cases in which sexual assault occurred and was not taken seriously. Considering the circumstances, no outcome-determinative plain error is apparent, and with respect to defendant's ineffective assistance allegation, an objection would not have resulted in a reasonable probability of an acquittal. *Carines*, 460 Mich at 763; *Ackley*, 497 Mich at 389.

Defendant further contends that the cumulative effect of the prosecutor's comments requires reversal. "This Court reviews 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). "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). But the prosecutor effectively self-corrected any error in connection with the comment about NS or the alleged "civic duty" comment, leaving only the "underwear" issue uncorrected. As noted, we do not conclude that those comments warrant reversal.

Affirmed.

/s/ Jane M. Beckering
/s/ Brock A. Swartzle