

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 26, 2013

v

ROGER JULIUS NEWSOME,

Defendant-Appellant.

No. 312241
Calhoun Circuit Court
LC No. 12-000231-FC

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b (victim less than 13 years old). The trial court sentenced defendant to concurrent terms of 210 to 430 months' imprisonment with credit for 233 days for each conviction. We affirm.

This matter arises out of defendant's sexual assault of two children in his care at a daycare he and his wife operated out of their home. The assaults occurred in 2005, when one of the victims was then aged 12 and the other aged 8. The matter was first investigated in 2006, when the older victim came forward, but although she told investigators about the younger victim, the younger victim could not be located at that time. That investigation was ultimately ended. Sometime between 2006 and 2010, the video recording of the older victim's interview was destroyed pursuant to clearing of space in the evidence room where it had been stored. In 2010, the younger victim's father contacted the police and another investigation was commenced. In 2011, a warrant was issued for defendant's arrest. By the time of trial, the video recording of the younger victim's interview was also missing. Defendant moved to exclude the testimony of both victims on the basis of the absence of the recordings. However, the trial court found no intentional misconduct and denied the request; both victims testified at trial.

Defendant first argues that the trial court incorrectly scored Offense Variable (OV) 8, MCL 777.38, at 15 points. We disagree. We review for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence and we review de novo whether those facts are "adequate to satisfy the scoring conditions prescribed by statute." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). A court should score OV 8 at 15 points when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL

777.38. Asportation “does not require the use of force” and may be merely movement to another room within a structure if being in that room reduces the likelihood of discovery or observation. *People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009); *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996).

Both victims testified that the sexual assaults took place in the upstairs guest bedroom. One of the victims testified that “[h]e’d take me in there – well, he’d take me in there and pull my clothes off and tell me to lay on the bed and do what he wanted.” The victim testified that as this was occurring, defendant’s wife was downstairs with the other children, and defendant’s son was in the house. Therefore, a preponderance of the evidence supports that defendant “asported” one of the victims to the guest bedroom by taking her upstairs. The upstairs bedroom was a “place of greater danger” because defendant took the victim out of the presence of his wife and the other children attending daycare, and others “were less likely to see defendant committing crimes” because the upstairs room was isolated from the downstairs area. Therefore, we find no clear error in the trial court’s scoring of OV 8.

Defendant next argues that the prosecutor improperly argued to the jury that the prosecution should not or could not be held accountable for the missing interview video recordings and that the victims’ testimony was consistent. This issue is not preserved for appeal. Defendant did not object to the prosecutor’s allegedly improper arguments at the time, and instead made counterarguments. This Court only considers such unpreserved allegations of prosecutorial misconduct for errors so grievous that they could not have been cured by an instruction to the jury, that deprived defendant of a fair trial, or that would result in a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999); *People v Goldberg*, 248 Mich 553, 555-556; 227 NW 708 (1929). We find no error of such magnitude, or indeed any error at all.

Nothing in the record suggests that the interview recordings were unavailable due to any bad faith, either by the prosecutor or any other entity. One recording was destroyed pursuant to a routine purge to make room for new evidence, and there was simply no explanation of any sort for why the other recording could not be found. “A trial court shall instruct the jury that if it determines that the prosecutor acted in bad faith it may infer that the destroyed, potentially exculpatory evidence would have been favorable to defendant.” *People v Cress*, 250 Mich App 110, 157-158; 645 NW2d 669 (2002), rev’d on other grounds 468 Mich 678 (2003). In light of the complete absence of any evidence of bad faith, defendant was not entitled to an adverse inference instruction.

We do not read the prosecutor’s arguments as improper attempts to assert to the jury that it could not use the investigation’s evidentiary failures against it. The prosecutor admitted in his opening statement and closing argument that the police investigations had not been “perfect” and argued that the case was not about the police department’s “level of police work” but rather what the victims would tell the jury from the witness stand. The prosecutor also argued that although the first investigation was terminated, a new investigation was begun when the second victim came forward, and the new investigation now had two corroborating sets of testimony. This is not an assertion that the absence of the interview recordings could not be held against the prosecution. Rather, the prosecutor properly set forth his theory of the case and stated the evidence to be presented at trial in opening statement, *People v Johnson*, 187 Mich App 621,

626; 468 NW2d 307 (1991), and properly argued on the basis of evidence actually presented at closing. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

The only possible impropriety in the prosecutor's argument was an unclear reference that might have suggested that both victims described a bunk bed in the room where the assaults occurred. In fact, only one of the victims testified that the room had a bunk bed; the other testified that the room had two king size beds. However, both victims did consistently describe the assaults as taking place in the guest bedroom. To the extent the reference to bunk beds was improper, "any undue prejudice [from this plain error] could have been cured by a timely objection and curative instruction." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). The trial court properly instructed the jury that the attorneys' arguments were not evidence, and moreover, a lack of evidence was a proper basis for finding a reasonable doubt. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant "has not established plain error that affected his substantial rights." *People v Hanks*, 276 Mich App 91, 96; 740 NW2d 530 (2007).

Affirmed.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Amy Ronayne Krause