STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 30, 2014
v	No. 309717 Wayne Circuit Court
GREGORY ALAN GLADDEN, Defendant-Appellant.	LC No. 11-006508-FH

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (commission of any other felony), common law misconduct in office, MCL 750.505, and willful neglect of duty, MCL 750.478. Defendant was sentenced to a term of 16 to 30 years' imprisonment for the CSC I conviction, 2 to 5 years' imprisonment for the misconduct in office conviction, and 345 days in jail for the neglect of duty conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The 22-year-old victim testified that she had two bachelor's degrees from the University of Michigan, having graduated in April 2011. On May 25, 2011, the victim was traveling in her car, turning from Trumbull onto Warren when she blew a tire after riding over the curb. She was driving on the rim when two separate police cars stopped her. Their lights were on, but the sirens were not activated. She thanked the officers for stopping and asked if one of the officers would follow her home, which was just a block away. Defendant, who was one of the officers, offered to escort her home. Once the other officer left the scene, defendant asked the victim if she had been drinking; he told her that he could smell it on her breath. The victim admitted that she had. The victim did not have her license and offered her passport. Defendant did not ask her to perform any field sobriety tests. Defendant told the victim to turn off her vehicle and step out of the vehicle. "[H]e said he was going to take me to a holding cell, call his boss and see if he could get me a deal." The victim was afraid that an arrest would "shatter my ability to pursue my career aspirations here in the city." She shared these concerns with defendant. She got into the back of his SUV and did not think she had any other choice. Defendant identified himself as "Derrick" from the Detroit police. He had a gun and a badge.

Defendant drove around for a while and eventually went to Manoogian Hall. The victim had not been there before. Defendant told the victim he was taking her to a holding cell. He used a swipe key to access the locked building. They took an elevator to the fourth floor where there was a lounge. They both sat down on a couch. Defendant ordered the victim to stand up, saying "I need to check you for weapons." The victim laughed and said, "I'm not even wearing any underwear." She was wearing only a sundress and flip-flops. She explained that "I was trying to keep it light. I wanted to get out with the least amount of confrontation possible and no brutality." The victim stood in a "T" position. Defendant ran his hands over her body and lingered at her breasts. The victim knew this was not a normal pat down. Defendant told the victim that he needed her to remove her dress. Again, she did not feel like she had a choice and she complied. The victim was trying to figure out "what was going on." She asked defendant if he wanted to have sex with her. It was not an offer. Defendant said "no." She asked if he wanted "a blow job" and he responded "yes." The victim put her dress back on. She told defendant that her mouth was too dry. She walked over to the sink where she filled an Absopure water bottle with water. The victim asked defendant how she would know if he had any sexually transmitted diseases. He said he was disease-free. The victim told defendant "if I do this you won't bring it up again." Defendant "shook on it." Defendant unzipped his pants and pulled out his penis. The victim put her mouth on it. "He held the back of my head, pushed it down, said, choke on it, b****." After approximately 30 seconds, defendant ejaculated in the victim's mouth. She spit the ejaculate into the water bottle. She stood up, capped the bottle, threw it away, and followed defendant back to the SUV.

Defendant drove her back to her car. She could not remember if she asked defendant to follow her home. The victim tried to drive home, but was shaking and crying so she pulled into a parking lot. She was also afraid of possibly being pulled over again. She left the car in the parking lot and ran to Bronx Bar where she knew her best friend and on again/off again boyfriend was playing pool. The victim told him what happened; she denied bragging about getting out of a ticket for giving a "blow job." The victim drank a beer and bought three more beers "to go." Her friend convinced her to call police.

The responding officers wanted her to go back to the Manoogian Hall for a walk through of the lounge where the assault took place. She was giving a physical description of defendant when defendant arrived at the scene. The victim said, "Holy s***, that's him."

Defendant had originally been charged with CSC III, MCL 750.520d(1)(b) (penetration involving force or coercion), as well as misconduct in office and willful neglect of duty. However, the prosecutor successfully moved to amend the information to charge defendant with CSC I on the basis that the penetration occurred during the commission of another felony – misconduct in office.[1] The jury found defendant guilty of CSC I, misconduct in office, and willful neglect of duty. He was sentenced as outlined above and now appeals as of right.

[1] Thereafter, defendant moved to quash the information as to CSC I and misconduct in office, arguing that where the CSC served as the basis for the misconduct in office charge, that conduct could not also be used as the predicate felony upon which the CSC I charge was based. The trial

II. INSTRUCTIONAL ERROR AS TO NONFEASANCE

In his attorney's brief and in his Standard 4 brief, defendant argues that the jury was not properly instructed as to CSC I or misconduct in office because the jury was instructed that it could find defendant guilty of misconduct in office under any of three different theories: malfeasance, misfeasance, or nonfeasance. Because the misconduct in office charge formed the basis of defendant's CSC I conviction, the two convictions are necessarily intertwined. We agree that our decision in *People v Waterstone*, 296 Mich App 121; 818 NW2d 432 (2012) is controlling and that the trial court erred in instructing the jury that it could consider defendant's nonfeasance. However, given the very unique circumstances of this case, we find that the error was harmless.

"We generally review claims of instructional error de novo." *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). Defendant complains that this particular instructional error deprived him of his constitutional right to a unanimous verdict. See *People v Cooks*, 446 Mich 503, 510–511; 521 NW2d 275 (1994). This Court also reviews de novo constitutional issues. *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009).

"Jury instructions must clearly present the case and the applicable law to the jury. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (internal quotation marks omitted). "We consider the jury instructions as a whole to determine whether the court omitted an element of the offense, misinformed the jury on the law, or otherwise presented erroneous instructions." *Hartuniewicz*, 294 Mich App at 242. "Instructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011) (internal quotation marks omitted.)

The court instructed the jury as follows:

> Now, in Count 1, ladies and gentlemen, criminal sexual conduct, first degree, multiple variables. In order to prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant engaged in a sexual act that involved fellatio, entry into [the victim's] mouth by the defendant's penis. . . . And, second, that at the alleged, the alleged sexual act occurred under circumstances that also involved misconduct in office.
>
> Now I'm going to give you the instructions for misconduct in office, ladies and gentlemen, so that you, because it needs to be read in tandem. The

court denied the motion and defendant's application for leave to appeal to this Court was denied "for failure to persuade the Court of the need for immediate appellate review." *People v Gladden*, unpublished order of the Court of Appeals, issued February 1, 2012 (Docket No. 308324).

elements of misconduct in office are the prosecution must prove each of the following elements beyond a reasonable doubt:

***

First, that the defendant, Mr. Gladden, was a public officer. A police officer is a public officer.

Second, the defendant, Mr. Gladden, committed misconduct. Misconduct can be malfeasance, which is committing a wrongful act, or misfeasance, which is performing a lawful act in a wrongful manner, or nonfeasance, which is failing to do an act required by the duties of the office.

Third, that the misconduct must have been committed by Mr. Gladden while exercising the duties of his office or under the color of the office.

Fourth, the misconduct must have been done with corrupt intent.

A corrupt intent is intentional or purposeful behavior or wrongful conduct pertaining to the requirements or duties of an office by an officer.

A corrupt intent is one where the act is done with a sense of depravity, perversion, or taint.

Here the prosecution alleges the misconduct was tainted. A taint is a trace of something bad or offensive. A corrupt intent does not require the prosecution to prove that the defendant intended to profit for himself, okay?

Defendant was charged with CSC I because the sexual assault was committed during the commission of "any other felony." MCL 750.520b(1)(c). The "other felony" in this case was a violation of MCL 750.505, which provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court. [MCL 750.505.]

The prosecutor thus elevated the CSC charge by arguing that the sexual assault occurred while defendant committed misconduct in office.

"To find a defendant guilty of the criminal offense of misconduct in office, the defendant must be found to be a 'public officer,' who while acting "in the exercise of the duties of his office or while acting under color of his office,' did 'any act which is wrongful in itself-malfeasance,' did 'any otherwise lawful act in a wrongful manner-misfeasance,' or failed to 'do any act which [was] required of him by the duties of his office-nonfeasance.'" *People v Carlin (On Remand)*, 239 Mich App 49, 52 n 2; 607 NW2d 733 (1999), quoting Perkins & Boyce, Criminal Law (3d ed.), p. 540. "A charge of misconduct is sustainable when it sets forth (1)

malfeasance, committing a wrongful act, or (2) misfeasance, performing a lawful act in a wrongful manner, or (3) *nonfeasance*, failing to do an act required by the duties of the office." *People v Milton*, 257 Mich App 467, 473; 668 NW2d 387 (2003) (emphasis added). Thus, "an officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, *nonfeasance*." *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003) (emphasis added.)

Defendant argues that because nonfeasance, which is the willful failure to perform a duty, is codified at MCL 750.478, it was error to allow the jury to consider nonfeasance when deciding whether defendant was guilty of common law misconduct in office. MCL 750.478 provides:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.

In *Waterstone,* this Court held that "[w]illful neglect of duty and corrupt nonfeasance are effectively one and the same for our purposes. If a public officer willfully neglects to perform a legal duty, he or she engaged in corruption or corrupt behavior." *Waterstone*, 296 Mich App at 141. As such:

> We hold that MCL 750.478 constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought by the AG against defendant. The elements of the charged offense are the elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which is the statute relied on by the AG in regard to the four counts at issue, MCL 750.505 cannot be invoked as a basis to try and convict defendant. [*Id.* at 144.]

Defendant complains that the instructional error resulted in a less-than-unanimous verdict because the jury could have concluded that defendant was guilty under any of the three theories – malfeasance, misfeasance, or nonfeasance and, pursuant to *Waterstone*, nonfeasance may no longer be considered. However, "not all instructional error warrants reversal. Reversal is warranted only if 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 Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013) (internal quotation marks omitted). The key question is "whether it is more probable than not that a different outcome would have resulted without the error." *Id.* (internal quotation marks omitted). An error determined the outcome if it undermined the reliability of the verdict. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

Any instructional error regarding the misconduct in office charge was rendered harmless by yet another error committed by the parties and the trial court. They all believed that consent was an issue for trial. When instructing the jury as to the elements of CSC I, the trial court added:

> Also read in tandem is the instruction of consent. There has been some 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. It is not necessary to show that [the victim] resisted the defendant to prove that the crime was committed. Nor is it necessary to show that [she] did anything to lessen the danger to herself.
>
> In deciding whether or not [the victim] consented to the act, you should consider all the evidence. It may help you to think about the following questions:
>
> Was [the victim] free to leave and not take part in the sexual act?
>
> Did the defendant, Mr. Gladden, threaten [the victim] with present or future injury?
>
> Did the defendant, Mr. Gladden, use force, violence, or coercion?
>
> Did the defendant display a weapon?
>
> If you find that the evidence raises a reasonable doubt as to whether [the victim] consented to an act freely and willingly, then you must find the defendant not guilty.

Thereafter, during deliberations, the jury sent the following note: "We want a legal definition of coercion as it relates to CJI 2nd, 20.27, and what constitutes display i[n] regards to a weapon?"

A lengthy discussion then took place between defense counsel, the prosecutor, and the trial court about whether additional instruction was necessary:

> MS. HAGAMAN-CLARK [prosecutor]: Judge, I don't have any objection to the Court reading the instructions as you've indicated that you were going to and indicating that force or coercion is not an element that I have to prove along with that consent instruction, again, I don't have any objection to that. If that's how the Court wants to do it, I don't have any problem with that, but I don't believe that giving them now additional instructions about force and coercion is appropriate. That's not the way this is charged.
>
> MR. MCCARTY [defense counsel]: Well, again, I would –
>
> THE COURT: You would what?
>
> MR. MCCARTY: Object.
>
> THE COURT: To what?
>
> MR. MCCARTY: Telling the jury that force or coercion is not something that's just an element when we're faced with this consent –

> THE COURT: It's not an element. It is [an] affirmative defense. Let's be clear about it. Criminal sexual conduct in the first degree has certain elements. I don't make those elements up, Counselor. I read them exactly as they are written, okay? You've argued that there was some evidence of consent here. It's scant, okay? But I gave you the instruction anyhow. So let's not overstate the case. It's very scant, okay?
>
> But it is an affirmative defense, and he's right, once an affirmative defense is alleged or proffered, it is the burden of the prosecutor to show lack of consent, okay? And that's what needs to be conveyed. Lack of consent.
>
> MS. HAGAMAN-CLARK: Agreed.
>
> THE COURT: Okay. This is a poorly written instruction, one that probably has to be rewritten at some point, but not here. So that's what the Court's going to instruct this jury on, and we'll go from there.

The court brought the jury in and explained:

> Okay, what the Court's going to do is the Court's going to read to you the count, Count 1, criminal sexual conduct in the first degree. I'm going to read those instructions to you again, okay, because you should clearly read those. I've given you a copy of those instructions, but you – but the best way to explain it is coercion is not an element of Count 1, but the defense argues that there was consent, and so it's an affirmative defense, now the prosecution has to show there wasn't consent. And how do you prove that? And that's what the consent statute, or consent instruction does, it says some things that you'll look at, okay? Just some things.
>
> But I can't state this too much, you got to rely on your common sense here, folks, okay? There's nothing that's scripted that says, "This is it. This is not." You have to rely on your common sense, okay?

The court proceeded to reinstruct the jury on CSC I in exactly the same manner it had previously, adding "again, specifically coercion, I'm not going to give you a definition on coercion. Rely on your own common sense and everyday experience to figure it out."

The trial court should never have instructed the jury as to consent. In *People v Waltonen*, 272 Mich App 678; 728 NW2d 881 (2006), the defendant was charged with CSC I for penetration involving the commission of another felony – specifically, delivery of a controlled substance. The prosecution's theory was that the defendant initially supplied the victim with Oxycontin free of charge and that, once the victim became addicted, the defendant required sex in exchange for the drugs. Defendant urged, *inter alia*, that he could not be convicted of CSC I because, by the victim's own account, the sexual acts were "consensual." *Id.* at 679-680. This Court disagreed:

> The plain and unambiguous language of § 520b(1)(c) does not require proof of force or coercion and does not otherwise provide for the defense of

> consent. We agree with [*People v*] *Wilkens*[, 267 Mich App 728; 705 NW2d 728 (2005)] that the issue of consent relative to charges brought under § 520b(1)(c) can only arise in the context of the underlying felony because if a defendant successfully argues the existence of consent with respect to the underlying felony, *assuming that consent is a legally recognizable defense*, the prosecution cannot establish the second element of CSC I pursuant to § 520b(1)(c). Here, there is no dispute that the crime of delivery of a controlled substance is not subject to a consent defense; therefore, consent is not a defense to the particular CSC I charges on which defendant is being prosecuted. The problem with implying that a consent defense is viable under § 520b(1)(c) with respect to sexual penetration, other than the fact that making such an implication runs afoul of principles of statutory construction, is that it results in a judicial modification of the statutory language. The language of § 520b(1) encompasses all acts of "sexual penetration," and ruling in favor of defendant's position would alter this clear language by carving out an exception for certain acts of sexual penetration, i.e., consensual sexual penetration. The statute does not provide that it applies to "nonconsensual sexual penetration," but rather it simply refers to "sexual penetration." [*Id.* at 689-690 (emphasis added).]

The Court concluded that "sexual penetration occurring 'under circumstances involving the commission of any other felony' is also automatically criminal sexual conduct. The statute leaves no room for consent." *Id.* at 690.

Consent is not an affirmative defense to CSC I if it is not a defense to the underlying felony. Here, the victim could not consent to defendant's misconduct in office because the "victim" of such behavior is the public in general. See *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). ("When a misguided police officer abuses or contorts the special privileges and powers afforded the officer, a public confidence is breached, resulting in a unique harm to society that threatens our system of justice.") Thus, defendant actually benefited from the trial court's erroneous consent instruction. For our purposes, the error solidifies the jury's findings in this case. The jury was under the mistaken belief that if the victim consented to the sexual acts, defendant had to be acquitted of CSC I. By finding defendant guilty, the jury clearly concluded that the victim did not consent. The jury's focus was plainly on defendant's misconduct or *malfeasance*. Defendant's willful conduct was at heart of the jury's deliberations. The concentration was on defendant's malfeasance and not simply defendant's nonfeasance in failing to follow protocol during a traffic stop. Because the jury's focus was unmistakably on defendant's malfeasance and not nonfeasance, we can safely conclude that the trial court's error in instructing the jury that it could consider defendant's nonfeasance was harmless.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his CSC I conviction because the victim admitted that the acts were consensual. In his Standard 4 brief, defendant writes:

> [The victim] agreed to sex. Actually according to her own testimony, she actually initiated the discussion about sexual intercourse. Never once did she

> testify that the defendant asked for or insisted that she have sex with him. The only mention of sexual intercourse came in the form of a question from [her]. In fact, she testified that the defendant refused her initial inquiry about sex. Defendant stated that he did not want to have sex with her. Despite his refusal, she asked about sex again, the second time specifying fellatio. The defendant finally said yes. The defendant and [the victim] consented to have sex. The defendant never asked to have sex, but [she] asked about sex twice.

We disagree.

"In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). As previously discussed, consent was not a defense to the CSC I charge in this case.

IV. DOUBLE JEOPARDY

In his attorney's brief and in his Standard 4 brief, defendant argues that the trial court erred in allowing defendant to be tried and convicted of common law misconduct in office when the charges also formed the basis for the CSC conviction. We disagree.

Whether the conduct that serves as the basis for a misconduct in office charge can also serve as the predicate felony for CSC I is a question of law that this Court reviews de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). Additionally, this Court reviews de novo constitutional issue of whether defendant was placed twice in jeopardy for the same offense. *Dipiazza*, 286 Mich App at 144.

The trial court did not err in permitting the misconduct in office charge to proceed to trial when the misconduct was based on the CSC offense. Additionally, double jeopardy did not prevent the jury from considering both charges.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003); *People v Grazhidani*, 277 Mich App 592, 598; 746 NW2d 622 (2008).

In *Milton*, the defendant, an Ecorse police officer, was charged with felony misconduct in office as well as assault with a dangerous weapon for his conduct in abusing a prisoner. He unsuccessfully moved to quash the charge of misconduct in office, arguing that the assault statutes adequately covered the alleged conduct. *Milton*, 257 Mich App at 468-470. This Court disagreed: "misconduct in office charge is the 'indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state.' There is no statute that expressly provides punishment for misconduct in office; therefore, defendant's argument is without merit." *Id.* at 472 (but note that this was decided before *Waterstone*). The Court added:

> Further, we reject defendant's claims that his misconduct consisted solely of his assaultive behavior and that "[t]his result, if allowed to stand, will strike fear in the hearts of police officers throughout this state." First, defendant was charged with misconduct in office for the "mistreatment of [a prisoner] in the custody of the Ecorse Police Department." This "mistreatment" consisted not just of beating the nonviolent prisoner but of demoralizing, humiliating, oppressing, and intimidating the prisoner simply because defendant, cloaked in the power and authority vested in him by the state, was in a position to do so. Defendant's conduct, aside from the assault and battery perpetrated against the prisoner, was reprehensible and, at the very least, constituted "misconduct" within the contemplation of the misconduct in office offense. Therefore, to the extent that defendant is arguing that he is being punished twice for the same predicate behavior, such claim is rejected. Further, the concern expressed in [*People v*] *Coutu (On Remand)*, *supra* at 705, 599 NW2d 556, that charges should not be brought under MCL § 700.505 if the conduct charged is more properly charged under another statute, is not present because there is no specific statute that prohibits the kind of behavior that defendant, a public official, exhibited against the prisoner. [*Milton*, 257 Mich App at 473-474.]

Similarly, the charge of misconduct in office is premised on much more than the actual act of criminal sexual conduct. Defendant placed the victim in his car and suggested that he could call his supervisor and "cut a deal." Under the guise of taking her to a holding cell, he transported her to a faculty lounge, an isolated location at 12:40 a.m. Defendant directed the victim to remove her clothing. These facts alone, without consideration of the actual sexual contact (fondling the victim's breasts) or the fellatio, constituted corrupt behavior by an officer in the exercise of his duties. Those facts would be sufficient upon which to find misconduct in office.

Accordingly, defendant's right from being placed in jeopardy twice for the same offense was not violated.

V. OFFENSE VARIABLE 7

Defendant argues that the trial court erred in scoring 50 points under offense variable (OV) 7 because "the events occurred without violence and occurred quickly." . . . "The sex act itself lasted only about 30." . . . "She suffered no physical injuries." "There were no threats made to her . . . and apparently there never was any forceful command or statement attributed to Mr. Gladden, other than the one during the 30-second act itself." We disagree.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

OV 7 of the sentencing guidelines addresses aggravated physical abuse. MCL 777.37(1);

Hardy, 494 Mich at 439. Under OV 7, a court must assess points for the circumstance, with the highest number of pertinent points, applicable to the offense according to the following:

(a) a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.....50

(b) no victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.....0

The prosecutor argued that defendant's conduct was designed to substantially increase the victim's fear and anxiety. The trial court agreed:

> As the Court recalls the testimony, not only was she taken to this remote location under guise that she was going to have, try to work out a deal with the defendant, but then she was also asked to disrobe where she testified at trial it made her feel humiliated, and she felt cheap, and, at least, that was the gist of the testimony, and that he did this purposely because she felt like he wanted to just embarrass her, and it destroyed her mentally.
>
> The worst part, however, is I believe the testimony that when the act itself occurred, he grabbed her, according to her testimony, by the back of the head, grabbed her hair and did so in a violent manner by pushing himself on her.
>
> And I think that that in and of itself, that testimony, I recall that very clearly, and I'm not going to specifically say what was stated, but the fact is is that that in and of itself was violent, it was degrading, and there's no question that it substantially increased the fear and anxiety of this victim. So 50 points is properly scored under OV 7.

"Conduct designed to substantially increase the fear and anxiety a victim" does not have to be similarly egregious to sadism, torture, or excessive brutality for OV 7 to be scored at 50 points. The relevant inquiries are (1) whether the offender engaged in conduct beyond the minimum required to commit the offense; and if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount. *Hardy*, 494 Mich at 443. There is adequate record support for the trial court's 50-point assessment where defendant subjected the victim to humiliation by forcing her to disrobe and then grabbing the back of her head while she was performing fellatio, saying, "choke on it, b****."

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel when counsel: 1) failed to investigate a police inter-office memo that revealed an anonymous caller overheard the victim at the Bronx Bar, laughing about getting out of a ticket by having sex; 2) failed to move for a directed verdict at the close of the prosecutor's proofs when it was clear that the victim had consented to the acts; and, 3) failed to object to the prosecutor's vouching for witnesses during closing arguments. We disagree.

Defendant failed to move for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436 443; 212 NW2d 922 (1973). As such, the Court's review is limited to error apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

A criminal defendant has the fundamental right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. A defendant claiming ineffective assistance of counsel must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302–303; 521 NW2d 797 (1994). In so doing, a defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Prejudice is shown when a defendant can show that, but for counsel's errors, the result of the trial would have been different. *People v McGraw*, 484 Mich 120, 142; 771 NW2d 655 (2009).

A. INTER-OFFICE MEMO

At an October 20, 2011, motion hearing on, *inter alia*, defendant's motion for discovery, the following discussion took place relative to the inter-office memo:

> MR. MCCARTY: There was an anonymous phone call that came in after this alleged incident indicating that the victim was bragging about this and was laughing about it and said that she just essentially sucked her way out of a drunk driving.
>
> There was – I was told that there was an investigation relative to that information that was ongoing. That was – I received this information I believe the day of the examination.
>
> THE COURT: Okay. Do we have any further – does the prosecutor have any further information on that?
>
> MS. HAGAMAN-CLARK: No, we've attempted to try to locate who that person is, and it came in on a, as an anonymous call. There was no caller I.D. number available. And the woman refused to give her name. Attempts to, to figure out who this person is have reached a dead end.

On the first day of trial, the prosecutor wanted to make sure that defense counsel did not discuss the memo because it constituted hearsay. The trial court struck a balance and allowed defense counsel to question the victim about whether she made such a statement, but refused to allow counsel to delve into the memo itself:

> THE COURT: The clarification is, is that the complaining witness – you are permitted and it's certainly within fair grounds to ask the complaining witness whether or not she performed certain sexual acts, okay.
>
> It's not permitted, however, to try to get into areas where somebody – some anonymous phone call was placed to – allegedly placed to the police station

indicating that the complaining witness was bragging about giving – performing certain acts on the Defendant.

MR. MCCARTY: Well, if I may, the People in their motion indicate the contents of the memo had not been verified. All I want to do is ask Captain Housner or Chief Hulk what they did in regards to that information that they received about her offering this –

THE COURT: No, that's getting into it and I've ruled, counselor, it's not coming in. Thank you.

On appeal, defendant complains that defense counsel should have done more, such as move for an evidentiary hearing "in order to ask the prosecutor under the penalty of perjury what she had in possession, exactly what she did to investigate, and if she talked to the police to see what they did and what information they possessed." This argument is without merit. The trial court had already questioned the prosecutor about what steps, if any, were taken to investigate the phone call. That the prosecutor was not under oath at the time is of no importance; the prosecutor is an officer of the court and is expected to provide accurate information. Additionally, although defense counsel was not able to question anyone about the memo's contents, defense counsel did question both the victim and her friend as to whether she had bragged about the incident at the bar. Therefore, the issue was before the jury. Defendant has failed to show that, but for the alleged error, the outcome of trial would have been different.

B. FAILURE TO MOVE FOR DIRECTED VERDICT

Defendant argues that once testimony was elicited that the victim consented to the sexual acts, the trial counsel was ineffective for failing to move for a directed verdict. However, as discussed above, consent was not an affirmative defense to the CSC I (commission of another felony) charge because consent was not an affirmative defense to the misconduct in office charge. Therefore, defense counsel was not ineffective for failing to raise a meritless motion. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

C. FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT

Defendant next argues that counsel was ineffective for failing to object to the prosecutor's statements during closing argument. 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 Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). "The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002) (internal citations omitted).

A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). And while a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts in evidence that a witness is worthy of belief. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

During closing arguments, the prosecutor argued:

> "She's making this up, and she's going to get lots of millions." That's what [defense counsel] wants you to believe. That's what he tried to say, and I objected and objected, but just talk about it. If she was going to make it up to be able to get the big dollars, it would have been a hell of a lot better than this. "I shook on it." Oh, yeah. If you're going to make something up, if you're going to make the log, why not make it good? Why not make it good? Why not leave all of that out? This is ridiculous.
>
> ***
>
> Nobody even had to know about this. And, quite frankly, what is it that she's had to go through since she's told. She's had to talk to a number of police officers, be grilled by cops who are looking at another cop as being the possible defendant. She's been mocked in court. She's had to undergo a sexual assault kit. She's had to tell this story over and over and over in an open courtroom full of people that she knows nothing about.
>
> Oh, yes, of course, she's got every motivation to make it up. Why would anybody make this up? Why would anybody subject themselves to this? It doesn't make any sense.

There is absolutely nothing wrong with the prosecutor's statements. They are a fair response to defense counsel's attack on the credibility of the complaining witness. Because there is nothing objectionable about the statement, defense counsel was not ineffective for failing to raise a meritless objection. *Ericksen*, 288 Mich App at 201.

None of the complained "errors" are supported by the record and defendant was not denied the effective assistance of counsel at trial.

VII. CUMULATIVE ERROR

Finally, in his Standard 4 brief, defendant argues that the cumulative errors of both counsel and the trial court effectively denied defendant a fair trial. We disagree.

This Court reviews a claim of cumulative error to determine whether the combination of errors deprived defendant of a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

"The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *Knapp*, 244 Mich App at 388. Only "actual errors" are aggregated when reviewing this argument. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). But in order to reverse based on cumulative error, the errors "must be of consequence." *Knapp*, 244 Mich App at 388. Thus, "[t]he effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

There were two errors in the case and both involve the trial court's instructions to the jury. As discussed in Issue I, it was error to allow the jury to consider nonfeasance with regard to the charge of misconduct in office as the underlying felony for CSC I. The trial court further erred in instructing the jury that it could acquit defendant if it determined that the victim consented to the sex acts. This second error plainly favored defendant, as it effectively required the prosecutor to prove an element that did not exist. Other than these two errors, there were no errors, the cumulative nature of which resulted in defendant being deprived of a fair trial. Thus, there is no reason to disturb defendant's conviction.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan