

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JUDE TAYLOR,

Defendant-Appellant.

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UNPUBLISHED  
February 24, 2004

No. 240344  
Saginaw Circuit Court  
LC No. 01-020077-FC

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c, one count of delivery of marijuana to a minor, MCL 333.7410(1), and one count of furnishing alcohol to a minor, MCL 436.1701(1). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to forty to sixty years' imprisonment for the CSC convictions, and ten to fifteen years' imprisonment for the delivery of marijuana and furnishing alcohol to minors convictions. Defendant appeals as of right, and we affirm his convictions, but remand for resentencing.

Defendant's convictions arise out of his activities with teenagers. Defendant brought teenagers to the home of his ex-girlfriend, while she was in a rehabilitation facility, and provided the teenagers with alcohol and marijuana. Defendant reportedly would flirt with and proposition the young females introduced to defendant through a neighborhood boy. Defendant met the victim, a thirteen-year old girl, through this neighborhood boy. Defendant picked the victim up near her home, drove to a liquor store where he purchased alcohol for the teens, and took the teenagers into the home through the back entrance to avoid being seen by neighbors.<sup>1</sup> After providing the victim with alcohol and marijuana, defendant entered the bedroom with the victim where he sexually assaulted her.

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<sup>1</sup> We note that defendant testified that he merely used the back door of the home because he did not have a key to the front door.

Defendant first alleges that the trial court abused its discretion when it denied the defense motion for a mistrial following the comment of a witness that defendant was a “killer.” We disagree. Our review of the trial court’s denial of a motion for mistrial is for an abuse of discretion. *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). To successfully move for a mistrial, a defendant must demonstrate that a prejudicial irregularity interfered with the court’s ability to provide a fair trial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Where the error is so egregious that the prejudicial effect cannot be removed in any other way, a mistrial should be granted. *Gonzales, supra*. However, an unresponsive, volunteered answer to a proper question does not present grounds for granting a mistrial. *Griffin, supra*.

In this case, defense counsel did not immediately object and request a mistrial. Rather, the witness either spoke so quietly or mumbled to such an extent that defense counsel did not hear the statement and had to be advised of the statement by others. After the witness volunteered that defendant was a “killer,” the prosecutor did not dwell on the subject or repeat the statement, but rather, received confirmation from the witness that he feared defendant. Upon being advised of the statement, the trial court denied the request for a mistrial, but provided the jury with a curative instruction. Accordingly, based on this record, we cannot conclude that the trial court’s denial of the request for a mistrial was an abuse of discretion. *Gonzales, supra*.

Defendant next alleges that the trial court abused its discretion by admitting other acts evidence. We disagree. A trial court’s decision to admit other acts evidence under MRE 404(b) will be reversed only where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). To admit MRE 404(b) evidence, it must be offered for a proper purpose, it must be relevant, the probative value of the evidence must not be substantially outweighed by unfair prejudice, and a limiting instruction may be provided upon request. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The examination of the probative value in light of any unfair prejudice is merely a balancing process. *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998). The rule seeks to avoid unfair prejudice, not prejudice that stems from the abhorrent nature of the bad act. *Id.* at 500.

Based on the record available, we cannot conclude that the trial court’s decision to admit evidence was an abuse of discretion. *Crawford, supra*. The testimony was offered to demonstrate defendant’s scheme or plan to obtain sexual favors from young girls by plying them with alcohol and drugs. Two young female witnesses testified that defendant approached them for sexual contact in a manner similar to his method of approaching the victim. However, defense counsel was able to establish that the other acts were merely suggestive comments by defendant and did not result in sexual activity. Moreover, defendant was able to establish through his own witnesses that he was an impossible flirt, who frequently complimented women of all ages.

Defendant next alleges that the trial court erroneously scored the offense variables in calculating the sentencing guidelines. We disagree. The trial court has discretion to assign points to offense variables provided there is record evidence to support the score. *People v Hornsby*, 251 Mich App 462 468; 650 NW2d 700 (2002). However, if the record contains any evidence to support a trial court’s score on a variable, it will be upheld. *Id.*

Contrary to defendant's arguments, the record contains strong evidence that defendant's actions caused the victim "serious psychological" injury as offense variable four (OV 4) requires. MCL 777.34. The victim testified that defendant provided her with substances that made her lose control of her limbs, but remain conscious while defendant repeatedly performed various sexual acts upon her. There was record evidence that defendant's actions altered the victim's demeanor and personality and caused her to withdraw. The trial court did not abuse its discretion when it scored defendant ten points under OV 4.

Defendant next alleges that the trial court misconstrued what actions could constitute "sadism" under OV 7. The statute defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37. Defendant misreads this definition as requiring that the defendant derive gratification from the suffering or humiliation. A close reading of the statute, however, reveals that OV 7 should receive a score of fifty points if the defendant's conduct causes extreme or prolonged humiliation and the "*conduct . . . is inflicted . . . for the offender's gratification.*" MCL 777.37 (emphasis added). Because defendant performed the sexual acts for his gratification, and the acts caused the victim severe and prolonged humiliation, the trial court did not abuse its discretion by scoring fifty points for this variable.

Defendant also argues that the prosecutor misled the trial court into scoring fifteen points for OV 8 by erroneously suggesting that defendant held the victim in the room when she tried to leave. A defendant may receive a score under OV 8 by either holding a victim captive or asporting the victim "to another place of greater danger or to a situation of greater danger." MCL 777.38. Defendant picked the victim up, took her to a liquor store, proceeded to the home of his girlfriend, then took the victim into a bedroom in the home. There was some evidence that defendant took the victim by the hand and led her into the bedroom while in an intoxicated state. Therefore, the trial court correctly scored defendant on OV 8, and we will not disturb the score. *Hornsby, supra*; *People v Piotrowski*, 211 Mich App 527, 529-530; 536 NW2d 293 (1995).

Defendant also contests his score under OV 10, exploitation of a vulnerable victim, but the evidence clearly indicates that before he assaulted the victim, he groomed her with sexual comments and flattery, plied her with alcohol and marijuana, and then exploited her incapacitated state. Therefore, the trial court correctly found the necessary "predatory conduct" to support the score. MCL 777.40.

Next, defendant alleges that the trial court excessively sentenced defendant on his CSC II count. We agree. In this case, the trial court applied the grid for class A felonies to all of defendant's CSC counts. CSC II, however, is a class C felony that requires application of a different grid. MCL 777.16y; MCL 777.64. Application of the correct grid drastically reduces defendant's minimum sentence range on this count. MCL 777.64. Furthermore, defendant correctly points out that the trial court erroneously enhanced his misdemeanor offense for furnishing alcohol to a minor as if it was a felony. Because these sentences far exceeded the penalty prescribed by the Legislature, we vacate the sentences on those counts and remand for resentencing.

Defendant's challenges to comments made by the trial court and the habitual enhancement are not preserved or supported by the record, and the challenge to an instruction

regarding unanimity is also without merit. *People v Cooks*, 446 Mich 503, 512-513; 521 NW2d 275 (1994).

We affirm defendant's convictions, but vacate the sentences for CSC II and furnishing alcohol to a minor and remand for resentencing on those counts.<sup>2</sup> We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Karen M. Fort Hood

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<sup>2</sup> On remand, the trial court should clarify the sentences that run concurrently and reflect the credit for time served before trial.