

v STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD EARL HODGES,

Defendant-Appellant.

UNPUBLISHED

September 30, 2004

No. 247682

Hillsdale Circuit Court

LC No. 02-269642

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction of criminal sexual conduct in the second degree (CSC II), second offense, MCL 750.520c; MCL 750.520f, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, the six-year-old daughter of defendant's former girlfriend, alleged that defendant touched her vagina. In response to defense counsel's question as to whether defendant's first statement to her was a denial of complainant's allegations, complainant's mother stated that defendant told her that he was not "going back to jail for this again." Complainant testified that on one occasion defendant removed her pants and touched her vagina. She stated that defendant touched his penis at the same time.

Defense counsel declined the trial court's offer to read a cautionary instruction regarding the reference to defendant's having been in jail. During its deliberations, the jury sent a note to the court asking if defendant had served time for a previous sexual assault conviction. The trial court instructed the jury that no evidence of a prior conviction had been introduced, and that it was not to consider the remark for any purpose whatsoever. The trial court denied defendant's motion for a mistrial.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Generally, "an unresponsive, volunteered answer to a proper question" does not warrant a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial. We disagree and affirm. The witness made the complained-of remark in response to a

question from defense counsel. The remark was not specifically responsive; however, a defendant may not complain of admission of testimony which he invited or instigated. *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982). Furthermore, reversal is not required because the other evidence clearly established defendant's guilt. The jury was entitled to accept complainant testimony that defendant touched her vagina and his penis, *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002), and to conclude that defendant engaged in sexual contact with complainant for the purpose of sexual gratification. MCL 750.520c; MCL 750.520a(k). In light of the strength of the other evidence against defendant, the fact that defendant declined the trial court's initial offer to give a cautionary instruction, *People v Lumsden*, 168 Mich App 286, 289; 423 NW2d 645 (1988), and the fact that the jury is presumed to have followed the trial court's direction to disregard the mention of defendant's previous legal difficulties, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood