STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 2009
v	No. 284988 Lenawee Circuit Court
CHARLES GEORGE HARBACH, Defendant-Appellant.	LC No. 07-013419-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to a prison term of 21 to 36 months. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred by denying his motions for a mistrial, which were based on repeated references to his prior incarceration. Defendant preserved this issue by moving for a mistrial below. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion exists when the trial court's decision is not within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). In the absence of consent to a mistrial, a court may declare a mistrial only if justified by manifest necessity, i.e., the prejudicial effect could be removed in no other way. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Manifest necessity generally exists when there are sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial, make its completion impossible, or amount to a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999); *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997).

References to a defendant's prior incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). "However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *People v*

Griffin, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). Specifically, an unresponsive and volunteered answer to a proper question is not usually error, *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983), *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975), and does not provide a basis for relief absent some evidence that the prosecutor conspired with or encouraged the witness to give the testimony at issue, *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990), or unless "the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

According to the record, the prosecutor advised the victim not to mention defendant's prior incarceration. Nonetheless, in identifying the places she had lived, the victim made reference to defendant "getting out" after mentioning that she had not seen him in eight years. The victim's answer was not responsive to the question asked, and it is clear that in light of the prosecutor's advice to the witness the prosecutor did not deliberately elicit the reference to defendant "getting out." Further, defendant specifically rejected a curative instruction, which could have alleviated any prejudice. Therefore, the trial court did not abuse its discretion in denying the first motion for a mistrial.

The victim later testified that defendant told her that he had not had sex with a woman for ten years. However, defendant did not object to that testimony or seek a mistrial because of it. Further, because the testimony related to defendant's own statement and was offered against him, it was admissible as substantive evidence. MRE 801(d)(2)(A); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). The statement was relevant to the issue whether the sexual contact was intended for a sexual purpose, see MCL 750.520a(q), and evidence that is admitted for one purpose is not inadmissible because its use for a different purpose is precluded. *City of Westland v Okopski*, 208 Mich App 66, 71; 527 NW2d 780 (1994).

Subsequently, the victim testified that she did not report the alleged offenses to the police "because I didn't want . . . to like put him away again." Again, however, there is no indication that the prosecutor intentionally sought to introduce evidence of defendant's incarceration. Rather, the prosecutor's question was designed to elicit that the victim had not called the police at defendant's behest, which was admissible to explain her failure to contact the police and to show defendant's consciousness of guilt. Further, a curative instruction could have eliminated any prejudice resulting from the reference to defendant's prior incarceration. Therefore, the trial court did not abuse its discretion in denying the second motion for a mistrial.

Finally, the trial court did not abuse its discretion in denying defendant's third motion for a mistrial. That motion was based on the prosecutor's rebuttal argument that the jury should accept the victim's testimony as true even though she did not report the alleged offenses because she had already been denied her father's companionship for eight years and "[s]he didn't want to lose him again, didn't want him gone." The argument was proper comment on evidence properly admitted and was unrelated to defendant's incarceration.

Defendant next argues that he is entitled to resentencing due to an error in the scoring of offense variables 10 and 13 of the statutory guidelines. This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the

evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The sentencing guidelines range, as enhanced for defendant's status as an habitual offender, was 2 to 21 months. MCL 777.68; MCL 777.21(3)(a). The trial court scored 25 points for OV 13, which considers a defendant's "continuing pattern of criminal behavior." MCL 777.43. A score of 25 points is proper if the offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The instructions state that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

Third- and fourth-degree CSC are both crimes against a person. MCL 777.16y. Both crimes are felonies for purposes of the Code of Criminal Procedure. MCL 761.1(g). Defendant was convicted of two counts of fourth-degree CSC. Although he was acquitted of third-degree CSC, the scoring of the guidelines need not be consistent with the jury's verdict. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). Thus, while a jury may decline to find that a fact has been proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994). The victim testified that when defendant slipped his hand down her pants and inserted his finger in her vagina. Although no other evidence, such as a confession, supported this testimony, the victim's testimony need not be corroborated. MCL 750.520h. In light of the lesser burden of proof applicable to sentencing decisions, the evidence was sufficient to justify a 25-point score for OV 13.

Defendant also challenges his 15-point score for OV 10. But because OV 13 was properly scored and the appropriate guidelines range would not be affected even if OV 10 were scored at zero points, any error is harmless and resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro