STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2013
v	No. 314021 Crawford Circuit Court
JONATHAN KELLY BYERS, Defendant-Appellant.	LC No. 12-003384-FH

Before: MURRAY, P.J., and DONOFRIO, JJ, and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant Jonathon Kelly Byers of one count of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration), for sexually assaulting his girlfriend. The trial court sentenced defendant to twelve to thirty years in prison. Defendant appeals as of right. We affirm.

I. FACTS

Defendant had a history of physically and verbally abusing his girlfriend during their three-year relationship. Eventually, on April 12, 2012, he sexually assaulted her, and was later charged with third-degree CSC. During Byers's two-day jury trial, a police investigator testified for the prosecution, at one point giving unsolicited testimony that Byers and his friend Kenny "apparently . . . do drugs" together. Defense counsel immediately moved for, but was denied, a mistrial. The court gave curative instructions on three separate occasions regarding the drug-use testimony. At the close of trial, the jury returned a verdict convicting Byers of third-degree CSC, MCL 750.520d(1)(b). The court sentenced Byers, a third-felony offender, to twelve to thirty years in prison, MCL 769.11(1)(a).

Byers appeals the trial court's denial of his motion for a mistrial, arguing (1) that the trial court erred in denying his motion for a mistrial based on the unfair prejudicial impact of the officer's drug-use testimony, and (2) that the judicial fact-finding at sentencing violated Byers's rights under the Fifth and Sixth Amendments to the U.S. Constitution. For the reasons discussed below, we affirm the lower court's decisions.

II. ANALYSIS

A. DENIAL OF BYERS'S MOTION FOR A MISTRIAL

Byers argues that the trial court abused its discretion when it denied his motion for a mistrial. This Court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "Error requiring reversal results only where a trial judge's denial of a defendant's motion for mistrial is so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983).

"A voluntary and unresponsive statement does not ordinarily constitute error." *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942). See also *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990) ("As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial . . . ."). A witness gives a volunteered and unresponsive answer when he "volunteer[s] information not requested in the question asked." *People v Barker*, 161 Mich App 296, 307; 409 NW2d 813 (1987). Generally, if a witness's unresponsive testimony contains inadmissible information, a timely objection and the court's striking of the testimony will cure any error. *Id.* The test this Court applies is whether the trial court abused its discretion in deciding "whether the defendant [was] deprived of a fair trial." *Hackney*, 183 Mich App at 531.

Particular rules apply to the testimony of police officers. When the testifying witness is a police officer, the trial court must closely scrutinize the potential prejudicial impact of the officer's statements. *Holly*, 129 Mich App at 415. This is because, unlike lay witnesses, "[p]olice witnesses have a special obligation not to venture into . . . forbidden areas." *Id.* at 415-416. Thus, "when an unresponsive remark is made by a police officer, th[e] Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense." *Id.* at 415. To this end, a remark by a police officer regarding a defendant's prior drug use, "depending upon its character and the circumstances involved, may constitute grounds for a mistrial." *People v Page*, 41 Mich App 99, 101; 199 NW2d 669 (1972). In CSC cases in particular, where the testimony regarding the incident tends to be "one-to-one, complainant versus defendant[,] [a]ny corroborating evidence on either side could tip the scales" in favor of one party over the other. *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979).

Relying on *Page*, Byers argues that Deputy Klepadlo's remarks regarding drug use constituted grounds for a mistrial. Specifically, he asserts that the prejudicial impact of the testimony combined with the weakness of the prosecution's case created circumstances warranting a mistrial. In contrast, relying on *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009), the prosecution argues that the trial court appropriately denied defendant's motion for a mistrial because Deputy Klepadlo's testimony was not unfairly prejudicial, as the case against Byers was strong and the trial court gave several curative instructions. We find the prosecution's argument more convincing.

To begin, Byers's reliance on *Page* is misplaced. That case addressed the appropriateness of a mistrial in light of an officer's unsolicited testimony that he saw the defendant in front of a "dope den." *Page*, 41 Mich App at 101. The *Page* Court's decision as to the prejudicial impact of the officer's testimony hinged on the fact that "there [was] . . . less than

a strong case against the defendant . . . ." *Id.* at 102. Here, however, even if Deputy Klepadlo had not given the unsolicited drug-use testimony, the evidence against Byers was sufficiently strong for a jury to find beyond a reasonable doubt that Byers was guilty of third-degree CSC.

Moreover, "[i]t is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Here, the trial court's three separate curative instructions alleviated any prejudice to Byers. In addition, in *Waclawski*, this Court held that testimony more prejudicial than Deputy Klepadlo's was insufficiently prejudicial to deprive the defendant of a fair trial. *Waclawski*, 286 Mich App at 708-710.[1] For these reasons, the trial court correctly concluded that Byers received a fair trial.

Byers argues that the court's curative instructions themselves were prejudicial. In support of his argument, Byers cites *People v Wallen*, 47 Mich App 612; 209 NW2d 608 (1973). *Wallen*, however, does not apply here, as the prosecution in that case made deliberate and repeated attempts to inject prejudicial information into the trial. Here, because Deputy Klepadlo's reference was isolated and unresponsive to the question asked, the trial court's curative instructions effectively cured any error.

Lastly, without citing any law to support his contention, Byers argues that because of the way the deputy's testimony was injected into the record, defense counsel was unable to screen for jurors who might be prejudiced against defendant for his alleged drug use. As the prosecution correctly notes, while the issue of drug use was not explored during jury voir dire, the trial court twice received assurance from jurors that they were able to disregard the deputy's testimony. Further, it is axiomatic that during voir dire attorneys will be unable to screen jurors for all potential prejudicial testimony that may or may not inadvertently come out at trial.

B. JUDICIAL FACT-FINDING ON BYERS'S OFFENSE VARIABLES

Byers argues that the trial court's fact-finding regarding the offense variables (OVs) for CSC violated his rights guaranteed by the Fifth and Sixth Amendments to the U.S. Constitution. This issue is unpreserved, as defense counsel failed to challenge the scoring of the OVs at the sentencing hearing. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews an unpreserved claim of constitutional error for plain error. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

Byers argues that, under the *Apprendi/Blakely*[2] rule, any fact increasing the penalty for a crime beyond the statutory minimum must be submitted to a jury and proved beyond a

[1] The *Waclawski* officer's testimony was based upon first-hand knowledge of the defendant's drug use, and the *Waclawski* trial court gave only one curative instruction.

[2] *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

reasonable doubt.[3] Byers recognizes that in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court held that the *Apprendi/Blakely* rule does not apply to minimum sentences established under Michigan's sentencing guidelines. Although Byers argues that the recent U.S. Supreme Court decision, *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), diminishes the value of *Drohan*,[4] we are obligated to follow our Supreme Court's decisions until that Court says otherwise. See *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009) (explaining that this Court is "bound by" the Supreme Court's decisions "until such time as our Supreme Court instructs otherwise").

In any event, *Alleyne* does not apply here. In that case, the U.S. Supreme Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 133 S Ct at 2155. This decision overruled *Harris v United States*, 536 US 545, 568; 122 S Ct 2406; 153 L Ed 2d 524 (2002), in which the Court held that only factors that increase the maximum, as opposed to the minimum, sentence must be proved to a factfinder beyond a reasonable doubt. Thus, the *Alleyne* Court reinstated *Apprendi*, which held that other than facts regarding a defendant's prior convictions, any fact that increases the penalty for a crime beyond the prescribed statutory minimum or maximum must be submitted to the jury and proven beyond a reasonable doubt. *Apprendi*, 530 US at 490. However, the *Alleyne* Court made clear that its ruling "does not mean that any fact that influences judicial discretion must be found by a jury." *Alleyne*, 133 S Ct at 2163. The Court explained that it has "long recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment." *Id.*

For these reasons, our Court just recently held that the holding of *Alleyne* does not apply to judicial fact finding that occurs in setting a minimum sentence under the sentencing guidelines. See *People v Herron*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 3-7. Accordingly, Byers's argument fails, as the judicial fact-finding involved in scoring his OVs did not violate his rights under the Fifth and Sixth Amendments to the U.S. Constitution.

III. CONCLUSION

In conclusion, the trial court properly denied Byers's motion for a mistrial because Deputy Klepadlo's testimony did not unfairly prejudice Byers's right to a fair trial in light of the strong case against him and the trial court's curative instructions. Additionally, the judicial fact-finding regarding Byers's OVs did not violate Byers's Fifth and Sixth Amendment rights, as such judicial fact-finding is permissible where the statute involved does not impose a statutory minimum.

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[3] Byers contends that as a result of the court's judicial fact-finding, his guideline sentence range was raised from 51 to 127 months (an E I level) to 72 to 180 months (an E II level).

[4] Although the *Alleyne* decision had been decided approximately six months earlier, in his brief defendant states that there is a "high likelihood that *McMillan/Harris* precedent will be overruled by *Alleyne*," without actually addressing *Alleyne*. For purposes of this opinion, we assume Byers would have made the argument that *Alleyne* applies.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra