

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
February 21, 2012

v

FORREST PETER SEALS,  
Defendant-Appellant.

No. 301472  
Kalamazoo Circuit Court  
LC No. 2009-001504-FC

---

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first degree sexual conduct (CSC-1), MCL 750.520b(2)(b). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 12 to 35 years' imprisonment. We affirm.

Defendant was a friend of the victim's father; the victim and her father considered defendant to be "family." The victim met defendant when she began living with her father at the age of 11. The victim eventually disclosed to her father an extensive pattern of sexual abuse she endured from defendant between the ages of 11 and 15. Defendant was charged with a series of criminal sexual conduct offenses. The victim testified about seven incidents in particular at trial. The jury found defendant guilty of CSC-1, but he was acquitted of other charges.

Defendant first argues that the trial court abused its discretion when it refused to grant a mistrial after the victim testified that defendant had "just gotten out of jail" before moving in with the victim's family. The parties had agreed prior to trial not to discuss defendant's prior incarceration. Very early in the trial, the prosecution attempted to establish that defendant was living in the victim's father's house at the time she disclosed the abuse to her father; the victim answered that defendant was living there, but unresponsively volunteered the additional information about defendant's history before he moved into the house. The trial court ordered the nonresponsive testimony stricken and instructed the jury to disregard it. The trial court subsequently denied defendant's motion for a mistrial, finding that the testimony was a "slip of the tongue" and not sufficiently prejudicial.

We review a trial court's denial of a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). Evidence of a prior conviction poses a danger that the jury will infer that a defendant is generally of bad character. *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). However, "an unresponsive, volunteered answer to a proper

question is not grounds for the granting of a mistrial,” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), “unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony,” *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). A curative instruction given to the jury by the trial court alleviates prejudice to defendant from an unresponsive, volunteered answer to a proper question. *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009).

The victim’s testimony here was clearly unresponsive and volunteered. Significantly, there is no indication whatsoever that the prosecution elicited the testimony, so *People v Wallen*, 47 Mich App 612; 209 NW2d 608 (1973), is inapposite. Likewise, the victim was not a law enforcement officer, so the elevated degree of care prosecutors might be expected to exercise to prevent law enforcement officers from providing inadmissible testimony is also inapplicable. *People v McCartney*, 46 Mich App 691; 208 NW2d 547 (1973), *People v McCarver*, 87 Mich App 12; 273 NW2d 570 (1978). This case is more analogous to *Lumsden*, in which we denied a mistrial where the defendant’s girlfriend gave unresponsive and voluntary testimony that the defendant was involved in multiple murders. *Lumsden*, 168 Mich App at 299. Moreover, the trial court’s curative instruction alleviated prejudice to defendant from the victim’s testimony. *Waclawski*, 286 Mich App at 710. The trial court did not abuse its discretion in denying a mistrial.

Defendant next argues the trial court abused its discretion in scoring offense variable (OV) 13 at 25 points. OV 13 should be scored at 25 points if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). “[A]ll 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). Defendant argues that the two counts for which he was acquitted may not be used, several of the allegations were likely the same incident, and some of the allegations described misdemeanors rather than felonies. The trial court found one described incident implausible, but found the remainder to be proper bases for scoring OV 13.

A sentencing scoring decision is reviewed to “determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Two of the incidents described by the victim would constitute fourth-degree criminal sexual conduct (CSC-4), “sexual contact with another person and . . . [t]hat other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.” MCL 750.520e(1)(a). Another incident would constitute aggravated indecent exposure, “any open or indecent exposure of his or her person,” MCL 750.335a(1), while “the person was fondling his or her genitals, pubic area, [or] buttocks . . . .” MCL 750.335a(2)(b). Both of these offenses are misdemeanors punishable by up to two years’ imprisonment under the

Michigan Penal Code, MCL 750.520e(2) and MCL 750.335a(2)(b), respectively. A misdemeanor punishable by two years' imprisonment is a "felony" under the Michigan Code of Criminal Procedure. *People v Smith*, 423 Mich 427, 445; 378 NW2d 384 (1985). Furthermore, both are listed as crimes against a person, under MCL 777.16y, and MCL 777.16q, respectively. Consequently, all three of these incidents may be used to score OV 13.

Additionally, another incident described by the victim was the basis for a third-degree criminal sexual conduct (CSC-3) charge. A person is guilty of third-degree criminal sexual conduct if the person "engages in sexual penetration with another person and . . . [t]hat other person is at least 13 years of age and under 16 years of age." MCL 750.520d(1)(a). "Sexual penetration" is defined as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r). The jury found defendant not proven guilty of this charge beyond a reasonable doubt. However, the facts adduced were sufficient for the trial court to find it proven by a preponderance of the evidence, which is a sufficient basis for scoring OV 13. MCL 750.520d(1)(a); *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993); *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010).

All of these incidents were not a single incident, as defendant argues. The factual patterns have some similarities: in each described incident, the victim fell asleep in the presence of or in the same house as defendant and woke up to defendant molesting her or exposing himself. However, this superficial similarity only shows that these were indeed an ongoing pattern of criminal activity. Three of the incidents took place in the victim's living room, and two took place in the office in the victim's home. Moreover, the victim offered distinct facts for each incident, including details of what clothing she was wearing, other events then occurring in her life and what exactly defendant did to her. Consequently, including the sentencing offense, the trial court properly found a continuing pattern of felonious activity involving five criminal acts committed by defendant against the victim. The trial court did not abuse its discretion in scoring OV 13 at 25 points.

Affirmed.

/s/ David H. Sawyer  
/s/ Peter D. O'Connell  
/s/ Amy Ronayne Krause