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January 8, 1998

Mr. Stephen Dennis Turner
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Carson City Regional Facility
10522 Boyer Road
P. O. Box 5000
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Dear Mr. Turner:

Enclosed is a copy of the Opinion issued by the Court of Appeals in your case. Please call me as soon as possible. If you cannot call me, write and I will arrange a phone call. I have enclosed a self-addressed stamped envelope for your convenience if you are not able to call me.

Sincerely,

C. Joseph Booker
Assistant Defender

kt
Enclosure

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APPELLATE DEFENDER OFFICE

STATE OF MICHIGAN
COURT OF APPEALS

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DEFENDANTS COPY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ARTHUR TURNER,

Defendant-Appellant.

UNPUBLISHED

January 6, 1998

No. 172928

Kent Circuit Court

LC No. 93-63014-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN DENNIS TURNER,

Defendant-Appellant.

No. 173814

Kent Circuit Court

LC No. 93-63014-FC

Before: Cavanagh, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

In these consolidated cases, defendant Stephen Turner appeals by right from his convictions of aiding and abetting first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), and second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3), whereas defendant Daniel Turner appeals by right from his convictions of kidnapping a child less than fourteen years old, MCL 750.350; MSA 28.582, and two counts of CSC I. Defendants were tried together before separate juries. Defendant Daniel Turner then pleaded guilty of being an habitual offender previously convicted of two or more felonies, MCL 769.11; MSA 28.1083. Stephen Turner was sentenced to serve fifteen to thirty years in prison for aiding and abetting CSC I and ten to fifteen years for CSC II. Daniel Turner was sentenced to serve enhanced prison terms of thirty to fifty years on each of his three substantive convictions.

Defendant Daniel Turner first argues that he was denied effective assistance of counsel when his trial counsel failed to investigate and develop a diminished capacity defense. Defendant argues that his apparent gender identity disorder and the complainant's testimony that he urinated on her supported such a defense. From the record, it appears that Daniel would dress as a woman and expressed dislike at being male and wanted to become female. However, Daniel does not indicate how this would render him incapable of appreciating the wrongfulness of child sexual abuse or of conforming his conduct to the law in this regard. Daniel has shown no correlation between having a gender identity disorder and committing child sexual abuse. Moreover, while Daniel Turner's conduct in this case was particularly repulsive, it does little to show that he lacked the capacity to control his actions so as to support such a defense. Accordingly, we conclude that Daniel has not shown either that counsel performed unreasonably by failing to present a diminished capacity defense or that there is a reasonable probability that the outcome of the trial would have been different if such a defense had been proffered. Thus, he has not established ineffective assistance of counsel. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994).

Defendant Daniel Turner next argues that the prosecutor's rebuttal comments were improper and denied him a fair trial.¹ Because he did not preserve his objection below, our review is limited to whether a curative instruction could have removed the prejudicial effect or whether relief is warranted to prevent a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The prosecution may not suggest to the jury that it decide a case on other than the evidence itself. *People v Bairefoot*, 117 Mich App 225, 231; 323 NW2d 302 (1982). However, the prosecutor here rhetorically asked each jury what hope the complainant or any child would have if the child reported being "hurt" by an adult and then was not believed, suggesting that the complainant would suffer harm if the jury "disbelieved" her account. While we strongly discourage the use of such civic duty arguments, see *People v Farrar*, 36 Mich App 294, 298-299; 193 NW2d 363 (1971), we do not find that manifest injustice will result to this defendant by declining to review this issue further. A timely objection by defense counsel and a curative instruction from the trial court would have eliminated any possible prejudice to defendant because of the prosecutor's inappropriate argument. See *People v Wise*, 134 Mich App 82, 102, 105-106; 351 NW2d 255 (1984).

Finally, we find defendant Daniel Turner's sentences—which were enhanced as a result of his status as an habitual offender—to be proportionate to the extreme seriousness of the current offense and to this particular offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Defendant Stephen Turner first argues that insufficient evidence was presented to support his conviction of aiding and abetting CSC I. In reviewing a ruling on a directed verdict motion, this Court views the evidence in a light most favorable to the prosecution to determine if sufficient evidence was presented to permit a rational trier of fact to conclude that the essential elements of the offense were proven beyond a reasonable doubt. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). A person who "procures, counsels, aids, or abets" the commission

of an offense may be convicted and punished as if he had directly committed the offense. MCL 767.39; MSA 28.979. Aiding and abetting presents a question whether evidence of concert of action existed between the defendant and the principal, *People v Mann*, 395 Mich 472, 478; 236 NW2d 509 (1975), and "comprehends all words or deeds which may support, encourage or incite the commission of a crime," *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). A person cannot be convicted of being an aider and abettor based on being an accessory after the fact. An aider and abettor must, in part, know of and intend to further the commission of the crime before it is completed. *People v Lucas*, 402 Mich 302, 303; 262 NW2d 662 (1978).

After a meticulous review of the record, we are compelled to conclude that no evidence—either direct or circumstantial—was presented to support defendant Stephen Turner's conviction of aiding and abetting his brother's commission of first-degree CSC. The trial court erred in accepting the prosecution's theory that Stephen's conduct after-the-fact in assisting Daniel's intimidation of the complainant not to tell anyone of the assault constituted evidence of aiding and abetting first-degree CSC.² An accessory after the fact is not an aider and abettor. *People v Karst*, 118 Mich App 34; 324 NW2d 526 (1982).

Notwithstanding our conclusion that no evidence supported defendant's conviction of aiding and abetting first-degree CSC, we did find more than sufficient evidence from which the jury could have found defendant guilty beyond a reasonable doubt of aiding and abetting second-degree CSC.³ For example, the complainant testified as follows on direct examination before both defendants' juries:

Q [By assistant prosecutor]: Now, going back to when you're back in the apartment, think about the man that has the beard now [Stephen Turner]. What did he do when you were inside the apartment?

A: When he had, when the man with the lipstick [Daniel Turner] had me in the apartment, he laid me on the mattress, and the man with the beard, he was feeling on my chest, and the other man with the lipstick was feeling on my private part. [T I, p 56.]

On recross-examination before defendant Stephen Turner's jury only, the complainant testified as follows:

Q [By defense counsel]: And when I just asked you a few minutes ago about being dragged back into the living room and your breasts being felt again, you said it was the man with the lipstick?

A: I'm talking about when I first came in the door, he threw me on the couch and the man with the beard [Stephen Turner], he was feeling my chest with the other man that was wearing the lipstick.

Q: When you first came in [the apartment]?

A: Yes. [T I, p 167.]

* * *

Q: And that's how you knew that [Stephen Turner] was in the back bedroom?

A: Yes. He didn't leave [the apartment] until the man with the lipstick got up and turned on the video, the video games. The other man was feeling on my chest.

Q: While the man with lipstick is getting the videos ready, that's when you're saying the man with the beard touched your chest?

A: Yes. [T I, p 168.]

Police officer Paul Robert Mesman responded to the scene first and was the first officer to question the complainant. While refreshing his memory with a copy of his police report, Mesman testified on direct examination as follows:

Q [by assistant prosecutor]: Okay, what did [the complainant] say happened?

A: After [another officer] arrived, [the complainant] and I continued to talk. [She] then stated that while she was in the bedroom, Stephen came in and said, "I want to do it, too," and began to feel her breasts. Daniel then told Stephen, "No."

[The complainant] stated that she moved her arm, and Stephen grabbed both her arms while Daniel laid on top of her--

* * *

Q: Is there a direct quote [of the complainant's in Officer Mesman's police report] regarding the Defendant Stephen Turner telling Daniel what to do with [the complainant]?

A: Yes, there is.

Q: What was that?

A: [She] told me that Stephen then told Daniel to get out of the room with her. [Tr III, pp 271-272.]

Sergeant Pamela Sue Carrier was present during portions of Officer Mesman's questioning of the complainant. Sergeant Carrier testified as follows on direct examination:

Q [by assistant prosecutor]: Did [the complainant] describe another individual [other than Daniel]?

A: Yes, she stated that there was another subject in the apartment who had come into the bedroom at the time that the other subject was assaulting her, and that that person drug [sic, dragged] her from the bedroom out into the living room.

And that while he was doing that, that he was touching her in the breast area and fondling her. [Tr III, pp 316, 338-339.]

Police Detective Debora Vazquez testified that she conducted an in-depth interview of the complainant at the hospital immediately following the assault. A tape recording of the interview was played for the jury, and a transcript of the recording was circulated amongst the jurors. In the interview, the complainant described defendant Daniel Turner's act of fellatio, then stated as follows:

[*Detective Vazquez*]: [T]hen what happened?

[*Complainant*]: Um, after that?

[*Detective Vazquez*]: Yea.

[*Complainant*]: He, um, his brother came in and he, he told his brother to come here. And his brother, and he told his brother to get my hands.

[*Detective Vazquez*]: Okay.

* * *

[*Complainant*]: And then, and then, um, after he, he, when he told his brother to, um, grab my hands, his brother said 'no, cuz I don't want her in my room.' And then, um, he told his brother to drag me into the living room, so he did.

[*Detective Vazquez*]: The brother did?

[*Complainant*]: Um-hum.

[*Detective Vazquez*]: Okay. Do you know what the brother's name is?

[*Complainant*]: No. He just asked me my name.

[*Detective Vazquez*]: Okay, and how did the brother drag you into the living room?

[*Complainant*]: By my neck.

* * *

[*Detective Vazquez*]: Did his brother do anything to you other than grab you by the neck and drag you into the living room?

[*Complainant*]: He feeled on my breast part.

[*Detective Vazquez*]: Okay, did he touch you anywhere other than your breasts?

[Complainant]: No.

[Detective Vazquez]: When did he touch you on your breast?

[Complainant]: When, um, when he was holding me down.

* * *

[Detective Vazquez]: Okay, so the one guy with the lipstick told him [Stephen] to grab you and to hold you down? You said that he had said 'No,' that he didn't want you in that bedroom.

[Complainant]: Um-hum.

[Detective Vazquez]: Did he hold you down at all in that bedroom?

[Complainant]: No, in the other—in the living room.

[Detective Vazquez]: Okay. Which room did the brother, the one who dragged you into the living room, which room did he feel on your breasts?

[Complainant]: (?)—that he felt on me in the bedroom.

[Detective Vazquez]: Okay. Did the brother do anything to you in the living room?

[Complainant]: No, but drag me in it.

[Detective Vazquez]: Okay. Did the brother touch you anywhere other than on your breasts?

[Complainant]: No. [Transcript of tape recording, 7/7/93, pp 19-22.]

The complainant's descriptions of the episode to the various police officers and at trial contained general discrepancies regarding the sequence of events and the particular rooms where each event occurred, and contained what appeared to be a specific discrepancy regarding which brother dragged her from the bedroom to the living room. Having reviewed the record, we conclude that, while some discrepancies are likely attributable to the complainant's youth and the traumatic circumstances of this offense, most were attributable to the ineffective and confusing methods used to question the complainant by the police officers and the attorneys.⁴ Nonetheless, we note that, at the hearing on defendant Stephen Turner's motion for a new trial, the presiding trial judge acknowledged the discrepancies in the record, but nevertheless assessed the complainant's credibility as follows:

The Court also believes that the new trial ought not be granted on that charge [aiding and abetting first-degree CSC]. Frankly, when you read the testimony here, it may not read as persuasively as it came across, but when you

listen to all of the testimony, the child's as well as the other things which corroborated it; some directly, some inferentially, and when you listen to some of the arguments of counsel which pulled all of these things together, I certainly am not at all uncomfortable with the jury's conclusion that they believed [the complainant].

Had they not believed her, I would certainly accept that verdict as well, but I can't possibly say here that there was anything suspect in their believing her, because everything taken together, if you were here to have heard and seen it all, did make a persuasive case.

Given the evidence presented at trial and the trial judge's assessment of the complainant's credibility, see, e.g., MCR 2.613(C), we conclude that Stephen Turner was an active participant in the assault of the complainant by Daniel Turner. Although the complainant testified that Stephen Turner did not hold her down or lay on top of her, he did assist Daniel, in some manner, to commit at a minimum second-degree CSC. Stephen's conduct amounted to more than being a mere bystander. In *People v Macklin*, 46 Mich App 297; 208 NW2d 62 (1973), this Court quoted with approval the following passage from *People v Smith*, 391 Ill 172, 180; 62 NE2d 669 (1945), which we find helpful:

It is true that mere presence is not sufficient to constitute one a principal unless there is something in his conduct showing a design to encourage, incite, or in some manner aid, abet, or assist the assault. Of course, an innocent spectator is not criminally responsible because he happens to see another commit a crime, but if the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the same.

Here, Stephen Turner was not a "mere innocent spectator"; he "assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the same."

2 3 6 7 In this context, Stephen also argues that the trial court's instructions to the jury regarding the aiding and abetting charge were erroneous. As explained above, we agree that the trial court apparently failed to recognize the distinction between conduct that amounts to aiding and abetting and that which constitutes accessory after the fact. However, even though the court's instructions were partially erroneous in this regard, we find any error to be harmless because, as explained above, sufficient evidence was presented during the prosecutor's case-in-chief to sustain defendant Stephen Turner's conviction of aiding and abetting second-degree CSC. Accordingly, we vacate defendant Stephen Turner's conviction of aiding and abetting first-degree CSC and remand this matter to the trial court for entry of a conviction of aiding and abetting second-degree CSC and resentencing on this offense only.

3 Defendant next contends that he was denied a fair trial where the trial court failed to instruct the jury that it must reach unanimity regarding which specific act of CSC I committed by

Daniel Turner formed the basis for convicting Stephen of aiding and abetting CSC I. Given our decision to vacate defendant's conviction of aiding and abetting CSC I, we find this issue moot.

5 Defendant Stephen Turner further contends that his aiding and abetting conviction should be overturned because the trial court abused its discretion, *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), by admitting hearsay testimony from a police detective relating statements made by the complainant. We agree with defendant that the testimony was hearsay, and not admissible under any recognized exception. In particular, the testimony was not admissible under MRE 803A because the complainant was aged ten at the time she made the statement. However, the erroneous admission of this testimony constituted harmless error because it was merely cumulative of the complainant's testimony at trial. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

4 Defendant Stephen Turner also argues that the trial court abused its discretion, *Coleman, supra* at 4, by admitting expert testimony before his jury that the complainant's post-incident behavior was consistent with that of a sexual assault victim because his counsel did not inject the issue of the complainant's seemingly odd post-incident behavior. We disagree. Stephen's counsel did not object to the eliciting of such testimony by Daniel Turner's counsel before both juries soon enough to preclude the matter from coming to the attention of his jury. Accordingly, we conclude that the trial court did not abuse its discretion by permitting the prosecution to present expert testimony that the complainant's behavior was consistent with that of victims of child sexual abuse before Stephen's jury. *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995).

9 Lastly, because we have ordered resentencing on defendant Stephen Turner's conviction of aiding and abetting second-degree CSC, we need not address his argument that his sentence was disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).⁵

No. 172928, affirmed. No. 173814, defendant Stephen Turner's conviction of aiding and abetting first-degree CSC is vacated and this matter remanded for entry of a conviction of aiding and abetting second-degree CSC, and resentencing on this offense only. Defendant Stephen Turner's remaining conviction and sentence are affirmed.

/s/ Mark J. Cavanagh

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

8 ¹ In No. 173814, defendant Stephen Turner also challenges a similar comment made by the prosecutor during closing argument. Our holding regarding this issue applies to both cases.

² The trial court denied defendant's directed verdict motion, finding that defendant's conduct in assisting Daniel "to avoid detection" after commission of the offense was sufficient to convict on an aiding and abetting theory. In support of its ruling, the trial court relied on *People v Goree*, 30

Mich App 490, 495; 186 NW2d 872 (1971). This reliance was misplaced because *Goree* involved a continuing offense and did not involve an aiding and abetting theory.

³ The verdict form given to defendant Stephen Turner's jury permitted them to find him guilty as to Count II of aiding and abetting first-degree CSC, guilty of aiding and abetting second-degree CSC, or not guilty. The fact that defendant Daniel Turner was not convicted of second-degree CSC does not preclude his accomplice from being convicted as an aider and abettor of that offense, so long as evidence that he committed the underlying crime is proven. See *People v Mann*, *supra* at 478; *People v Genoa*, 188 Mich App 461, 463-464; 470 NW2d 447 (1991).

⁴ For example, the discrepancy regarding which brother dragged the complainant from the bedroom to the living room can be attributed to the questioners using nondescript terms such as "he" or "the brother" or "his brother," rather than establishing clearly to the complainant which brother they were asking about. As another example, the confusion regarding the sequence of events can be attributed to the questioners sometimes failing to ask their questions in sequence, or simply allowing the complainant to become sidetracked, jumping around from one event to another.

⁵ Nevertheless, given defendant Stephen Turner's active participation in this heinous offense, were we to have addressed this claim, we would have concluded that his fifteen-year minimum sentence for aiding and abetting first-degree CSC did not constitute an abuse of discretion by the sentencing court. See *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994).