STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 173814

Lower Court No. 93-63014-FCB

KENT COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

C. JOSEPH BOOKER (P31885)
Attorney for Defendant-Appellant

NOTICE OF HEARING

DELAYED APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: C. JOSEPH BOOKER (P31885)
Assistant Defender
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

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NOTICE OF HEARING

TO:

KENT COUNTY PROSECUTOR
Hall of Justice
333 Monroe Avenue, N.W.
Grand Rapids, MI 49503

PLEASE TAKE NOTICE that on **June 9, 1998**, the undersigned will move this Honorable Court to grant the within **DELAYED APPLICATION FOR LEAVE TO APPEAL**.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: C. Joseph Booker

C. JOSEPH BOOKER (P31885)
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(313) 256-9833

Date: May 13, 1998

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Defendant-Appellant answers, "Yes".

II. **DID MANIFEST REVERSIBLE ERROR OCCUR WHEN THE TRIAL COURT ADMITTED DAMAGING HEARSAY TESTIMONY OVER DEFENSE OBJECTION?**

Defendant-Appellant answers, "Yes".

III. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE GAVE A CIRCULAR INSTRUCTION ON THE INTENT REQUIRED FOR AIDING AND ABETTING WHICH FAILED TO CONVEY TO THE JURY THAT THE ACCESSORY MUST ASSIST THE PRINCIPAL WITH KNOWLEDGE OF THE CRIME INTENDED BY THE PRINCIPAL?**

Defendant-Appellant answers, "Yes".

IV. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT THE ASSISTANCE OFFERED BY DEFENDANT MUST HAVE HAD THE EFFECT OF INDUCING THE CRIME?**

Defendant-Appellant answers, "Yes".

V. **DID CLEAR REVERSIBLE ERROR OCCUR WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT IT MUST BE UNANIMOUS AS TO A THEORY OF THE PRINCIPAL'S GUILT BEFORE IT COULD FIND STEPHEN TURNER GUILTY AS AN AIDER AND ABETTOR?**

Defendant-Appellant answers, "Yes".

VI. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR ARGUED TO THE JURY THAT THEY HAD A CIVIC DUTY TO BELIEVE THE TESTIMONY OF THE COMPLAINING WITNESS?**

Defendant-Appellant answers, "Yes".

JUDGMENT APPEALED FROM, GROUNDS FOR APPLICATION AND RELIEF SOUGHT

Defendant-Appellant **STEPHEN DENNIS TURNER** appeals from a decision of the Court of Appeals affirming in part and reversing in part. The decision of the Court of Appeals is in part clearly erroneous, will cause material injustice to Defendant, and conflicts with decisions of this Court and of the Court of Appeals. See MCR 1985, 7.302(B)(5). Defendant requests that this Court reverse in part the judgment of the Court of Appeals, vacate his conviction for aiding and abetting second degree criminal sexual conduct and remand this case for a new trial or resentencing on the remaining count of second degree criminal sexual conduct. In the alternative, Defendant requests that this Court remand this case for a new trial on both counts of second degree criminal sexual conduct. In the alternative, Defendant requests that this Court remand this case for resentencing on both counts. In the alternative, Defendant requests that this Court grant leave to appeal on the unresolved issue of the proper standard for the admission of "rape trauma syndrome" evidence. Cf. People v Beckley, 434 Mich 691; 456 NW2d 391 (1990).

Defendant Stephen Turner was convicted of one count of aiding and abetting first degree criminal sexual conduct (CSC I) and one count of second degree criminal sexual conduct (CSC II). Defendant appealed, claiming, inter alia, that his conviction for CSC I was not supported by sufficient evidence. Defendant requested resentencing on his CSC II conviction in the event that the Court

were to vacate his CSC I conviction. (See Defendant's Brief on Appeal, p 21.)

In a nine-page unpublished per curiam opinion released January 6, 1998, the Court of Appeals agreed with Defendant's sufficiency claim, vacated Defendant's conviction for aiding and abetting CSC I, and remanded this case for entry of a conviction of aiding and abetting second degree criminal sexual conduct, and resentencing on that offense only. (Slip op., p 8) The convictions of Defendant's brother, Daniel Turner, were affirmed. (Court of Appeals No. 172928.) (Slip op., p 8) (See attached copy of opinion, Appendix A.)

Importantly, the opinion issued by the Court of Appeals completely failed to address three of the nine issues raised on appeal.

Defendant requested rehearing in the Court of Appeals and contended that he was minimally entitled to reversal of his aiding and abetting CSC II conviction, entry of which was ordered by the Court of Appeals. Defendant further contended that he was clearly entitled to resentencing on the remaining count of CSC II.

In an order entered March 24, 1998, the Court of Appeals denied Defendant's Motion for Rehearing. (See attached copy of Court of Appeals order, Appendix B.)

As the Court of Appeals has recognized, the prosecutor's theory of aiding and abetting CSC I was that Stephen Turner was guilty because he was allegedly an accessory after the fact to Daniel Turner's commission of that offense. (Slip op., p 3) The

Court of Appeals correctly held that "[a] person cannot be convicted of being an aider and abettor based on being an accessory after the fact." (Slip op., p. 3) (See Appendix A.)

Having rejected the prosecutor's theory of guilt on the charged offense of CSC I, the Court of Appeals essentially developed its own theory of guilt of the lesser offense of CSC II. To this end, the Court scoured the record for any evidence which might be used to support the Court's new charge of aiding and abetting CSC II. (Slip op., pp 3-6) The Court even went so far as to order the production of a tape recording of a police interview[1] with the complainant, and used the complainant's out-of-court statements in this interview to support its theory of aiding and abetting CSC II. (Slip op., pp 5-6)

Defendant contends that the Court of Appeals' action in creating its own theory of CSC II, denied Stephen Turner his right to a jury trial on that offense. As the United States Supreme Court stated in Presnell v Georgia, 429 US 14, 16; 99 S Ct 235; 58 L Ed 2d 207, 211 (1978):

> "In Cole v Arkansas, 333 US 196, 92 LEd 644, 68 SCt 514 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for a unanimous Court:
>
> > 'It is as much a violation of due process to send an accused to prison following

---

[1] Neither party had requested production of the tape recording or the transcript of the recording.

> conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . .
>
> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.' Id., at 201-202, 92 LEd 644, 68 SCt 514.
>
> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of trial."

See also Cole v Arkansas, 333 US 196; 68 S Ct 514; 92 L Ed 644 (1948).

Although it was never clear what Stephen Turner was supposed to have done to make him guilty of CSC I[2], by the time of closing arguments the prosecutor had settled on the position that Defendant was guilty because he assisted Daniel Turner after the offense. Therefore, Defendant has never had a jury trial on the theory stated in the Court of Appeals opinion, or on any similar theory of the greater offense of CSC I. If this Court finds that the prosecutor made a mistake in not charging Stephen Turner with a separate count of CSC II, it is a mistake with which the prosecutor must live. Presnell v Georgia, supra.

Moreover, once the Court of Appeals vacated Stephen Turner's conviction for CSC I, Defendant clearly became entitled to

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[2] On appeal to this Court, Defendant argued that the trial judge erred in failing to instruct the jury that it must be unanimous as to a theory of the principal's guilt, in order to convict Defendant as an aider and abettor. (See Defendant's Brief on Appeal, Issue III.)

resentencing on the remaining count of CSC II. (See below.) Stephen Turner received a fifteen year minimum sentence on CSC I. Defendant's minimum sentence for the CSC II offense was only 10 years. The Court of Appeals has vacated the charge on the most serious offense of which Defendant was convicted. For the reasons stated below, as well as those stated in Defendant's Brief on Appeal, Defendant is manifestly entitled to resentencing on the CSC II count. People v Bergevin, 406 Mich 307; 279 NW2d 528 (1979), modified 407 Mich 1148 (1979); People v Fossey, 41 Mich App 174, 184-185; 199 NW2d 849 (1972), modified 390 Mich 757 (1973); People v Flinnon, 78 Mich App 380, 392-393; 260 NW2d 106 (1977); and People v Breckenridge, 81 Mich App 6, 17; 263 NW2d 922 (1978).

In Fossey, supra, the defendant was convicted of both assault with intent to rob armed and attempted safe robbery based upon a single incident. The Court of Appeals found that "defendant's actions constituted only one transaction" and reversed the conviction for assault with intent to rob armed. Id., p 184-185. The Court of Appeals did not address any sentencing issues in its opinion. The defendant in Fossey filed an application for leave to appeal in the Michigan Supreme Court, and that Court remanded for resentencing on the remaining count of attempted safe robbery. 390 Mich 757.

In Bergevin, supra, the defendant was charged with three counts of kidnapping based upon a single incident, where only one victim was involved. Id., p 312. The Michigan Supreme Court vacated two of the three convictions finding that they were not authorized

by the kidnapping statute. Id. However, the Court affirmed the conviction on the remaining count. Id. The Court did not make any decision regarding any sentencing issues in its initial opinion. The defendant in Bergevin filed a motion for rehearing, and in lieu of granting rehearing, the Supreme Court issued an order remanding the case for resentencing. 407 Mich 1148. See also People v Flinnon, supra, and People v Breckenridge, supra.

The above-cited cases clearly stand for the proposition that where an appellate court reverses one or more convictions in a case involving multiple counts, the defendant is entitled to resentencing on the remaining counts. As the Court in Flinnon, supra, stated:

> "The sentencing procedure is an important step in the criminal process and must be based on accurate information. People v Malkowski, 385 Mich 244; 188 NW2d 559 (1971)." 78 Mich App 380, 392.

For the reasons stated above, Defendant respectfully requests that this Court minimally remand this case for resentencing on the original count of CSC II.

The Court of Appeals opinion also rejects Defendant's argument that he was denied a fair trial when the trial judge failed to instruct the jury that it must be unanimous regarding which specific act of CSC I committed by Daniel Turner formed the basis for convicting Stephen Turner of aiding and abetting CSC I. (Slip op. pp 7-8). The Court found the issue was moot in light of its disposition of the sufficiency issue. (Slip op. p 8) However, the trial judge also failed to instruct the jury that they had to be

unanimous as to a theory of CSC II. (T 825-826) Therefore the issue is not moot. Had the jury acquitted Stephen Turner of CSC I, but convicted him of aiding and abetting CSC II, Defendant would still have been entitled to a unanimity instruction. People v Cooks, 446 Mich 503, 524; 521 NW2d 275 (1994).

The Court of Appeals has also found error in the admission of hearsay testimony, but has determined that the error was harmless:

> "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 Rodriquez, (On Remand), 216 Mich App 329, 332; 549 NW2d 359 (1996)." (Slip op., p 8).

Although not stated in the Court of Appeals opinion, the out-of-court statements at issue here were made to a police witness. The admission of the hearsay testimony described above was not harmless, because it tended to bolster the credibility of the complainant as to the specific allegations related in the out of court statements. People v Stricklin, 162 Mich App 623, 629-630 (1987). The concept that hearsay testimony was "merely cumulative" threatens to swallow up the hearsay rule, violates Stricklin, and

ignores the impact on the jury when a police officer testifies that the complainant told him the same thing she is telling the jurors.

The Court of Appeals also rejected Defendant's highly substantial claim that the trial court abused its discretion in admitting expert testimony before his jury that the complainant's post-incident behavior was consistent with that of a sexual assault victim:

> "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)." Slip op., p 8.

What the Court of Appeals did not say in addressing this issue, was that Defendant had complained on appeal that the testimony actually elicited exceeded the permissible scope of "rape trauma syndrome" evidence. People v Beckley, 434 Mich 691; 456 NW2d 391 (1990).[3] The so-called expert in the instant case testified

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[3] People v Beckley, supra, was a plurality opinion.

that the complainant "was assaulted." (T 637)[4] This testimony exceeded the permissible scope of rape trauma syndrome testimony. Beckley, supra, at 725. Moreover, the Court of Appeals conclusion that Mr. Turner's attorney did not object "soon enough" simply cannot be squared with the record. Defendant's attorney objected at every available opportunity, and vigorously sought to avoid having the issue of the complainant's post-incident behavior injected. (See Issue I, infra.]

Although the Court of Appeals opinion does not address it, Defendant also raised an issue on appeal relating to the trial court's erroneous instructions on the intent required for aiding and abetting. [See Issue III, infra.] These instruction referenced aiding and abetting CSC I and CSC II. (T 829-831; 833-834) Had the jury acquitted Stephen Turner of CSC I, but convicted him of aiding and abetting CSC II, Defendant could have argued on appeal that the intent instructions for CSC II were erroneous. The disposition of Defendant's sufficiency issue by the Court of Appeals leaves Defendant in no different position. The Court of Appeals has not specifically held that the issue is moot. They have simply not addressed it at all. However, the issue is not moot. Stephen Turner was entitled to proper instructions on the offense of which he was ultimately convicted.

Similar considerations apply to Defendant's argument that the jury instructions on aiding and abetting failed to apprise the jury

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[4] The expert did not know the complainant, and had not interviewed her. (T 638)

that the assistance offered by Stephen Turner must have had the effect of inducing the crime. [See Issue IV, infra.] The Court of Appeals has completely failed to address this issue. For the reasons stated above, the issue was not rendered moot by the Court's disposition of the sufficiency issue.

Defendant also objects to the Court of Appeals' failure/refusal to address Issue VIII of Defendant's Brief on Appeal. [See Issue VI, infra.]

Defendant also requests that this Court strike footnote 5 from the Court of Appeals opinion, on the basis that the footnote is totally unnecessary to the resolution of Defendant's Milbourn[5] issue, and constitutes an advisory opinion on a criminal matter not before the Court.

Defendant argued before the Court of Appeals that his 15-year minimum sentence for CSC I constituted an abuse of the sentencing Court's discretion. (See Issue IX, Brief on Appeal.) The Court of Appeals has vacated that conviction on grounds of sufficiency of the evidence. However, instead of finding that Defendant's Milbourn issue was moot because the CSC I conviction had been vacated, the Court of Appeals found that it did not need to address this issue because it had ordered resentencing on a new conviction of aiding and abetting CSC II. (Slip op., p 8) The Court then stated in a footnote, that "were we to have addressed this claim, we would have concluded that his fifteen-year minimum sentence for

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[5] People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990).

aiding and abetting first-degree CSC did not constitute an abuse of discretion." (Slip op., p 9, footnote 5.)

Thus, the Court of Appeals has held essentially that Stephen Turner is legally innocent of CSC I, but <u>if he were guilty</u> a fifteen-year minimum sentence would not constitute an abuse of discretion! This holding goes beyond mere dictum, or even obiter dictum. This is an opinion based upon facts which were <u>inconsistent with those found by the Court</u>. The only value in such a holding is a value to the prosecutor at the resentencing proceeding. However, the prosecutor does not need the help, because the Court of Appeals has inexplicably refused to order a resentencing on both counts, and has refused to explain its decision. The Court of Appeals has seen fit to issue an opinion on a matter not before it (see above), it should have issued an opinion on the claims that <u>were</u> before it.

STATEMENT OF PROCEEDINGS AND FACTS

On December 13, 1993, Defendant-Appellant **STEPHEN DENNIS TURNER** was convicted of the offenses of first degree criminal sexual conduct and second degree criminal sexual conduct, following a jury trial in the Kent County Circuit Court, the Hon. Dennis C. Kolenda, Circuit Judge, presiding. (T., Final Day of Jury Trial, 25)

The charges against Mr. Turner arose out of the alleged abduction and sexual assault of ten-year-old Lakeysha Cage, on July 7, 1993. (T 5) The prosecutor's theory of the case was that Defendant's brother, Daniel Turner, abducted the complainant as she was playing near her apartment at 4130 Oak Park Street, in Grand Rapids. (T 5) The prosecutor alleged that Daniel Turner took the complainant to an apartment at 4139 Oak Park, in the same apartment complex where the victim lived. (T 5) It was the prosecutor's theory that Daniel Turner committed an act of cunnilingus on the complainant, and forced the complainant to perform fellatio on him. (PET 16-17; T 6) Evidence was introduced during the trial that Daniel Turner was a cross-dresser. (T 52) The prosecutor alleged that Daniel Turner forced the complainant to play video strip poker and to wear women's clothing. (T 52-54)

Defendant was charged as an aider and abettor in one of the CSC I offenses committed by Daniel Turner. (T 4, 13) The precise act which Defendant was supposed to have aided and abetted was not specified in the information. The prosecutor alleged that Stephen

Turner assisted his brother in the offenses by staging a photograph purporting to show the complainant stabbing Defendant. (T 845, 849, 879) Defendant was also charged with second degree criminal sexual conduct, growing out of an alleged touching of the complainant in the apartment. (T 6)

The defense theory of the case was that there was absolutely no evidence that Defendant aided and abetted Daniel Turner's assault on the complainant, and no credible evidence that Defendant touched the complainant during the offense. (T 853-856; 862-863; 867-868) Defense counsel argued to the jury that Stephen Turner specifically refused to follow an order given by his brother. (T 17-18) Counsel also noted that Defendant called the police to the apartment after the offense. (T 870)

At the preliminary examination in this matter, the prosecutor conceded that Stephen Turner was not in the room when Daniel Turner sexually penetrated the complainant. (PET 44) (Cf. T 6)

Prior to trial, defense counsel filed a motion to sever the trials of the two brothers. (T Mot., 11/24/93, 9-12) The trial judge ordered that the trials would take place at the same time before separate juries. (T Mot., 11/24/93, 12-13)

The trial judge gave the following preliminary instruction on the elements of aiding and abetting:

> "As I said, there is no particular assist that has to be given, but you have to decide that they did something, which in a very real way, assisted the commission of the crime.
>
> You know the typical things, it probably won't occur in this case, so that's some of the reasons why I'll give the examples to give you

> a feel for it, you know, acting as a lookout, watching to see if the police or someone are coming is an assist to a person who is, in fact, engaging in a crime. Holding down someone while someone else commits a crime can be aiding and abetting.
>
> Simply encouraging the person on, even though you don't do anything physical, but you eeg [sic] them on, or encourage them to do it or help them plan. All of those things, while they aren't actually committing the ultimate crime, are assisting enough to make the person who assisted equally guilty with the person who actually carries out the crime, provided that the person who helped meant for his help to be of some assistance.
>
> Now if you help someone unwittingly, by accident, not knowing that you are helping them, that's no crime, even though you did, in fact, help. You have to help and you have to have help with the specific intent that your assistance would indeed aid them in carrying out their particular crime." (T Prel. Instr. and Opening Statements, 39-41; emphasis added.)

In his opening argument to the jury, the prosecutor stated that during one of the sexual penetrations by Daniel Turner, Defendant was "assisting, he's helping out, he's holding on to her." (T 6) (Cf. PET 32, 33, 41, 44; T 141, 144)

Following opening arguments, defense counsel objected to the trial court's use of an example in which the aider and abettor holds the victim down for the principal. (T 33-34) (See above and see T Prel. Instr. and Opening Statements, 39-41) Defense counsel stated that she did not object at the time the judge made the statement, because she assumed such an act would not be part of the prosecutor's proofs. (T 33-34) Defense counsel indicated that she

was not requesting a curative instruction to the jury, because she did not want to call attention to the matter. (T 33-40)

Lakeysha Cage testified that her birthday was March 16, 1983. (T 45) The complainant stated that on July 7, 1993, she was playing on the steps near her apartment, when Daniel Turner grabbed her, put his hand over her mouth, and dragged her to his apartment. (T 47-48) The witness testified that Daniel Turner had on lipstick. (T 49) The complainant stated that Daniel Turner threw her down on a mattress in the living room and got on top of her. (T 49) (Cf. PET 8-10) According to the complainant, Daniel Turner then took her to the bedroom and took off her clothes. (T 49) (Cf. PET 8-10)

The complainant testified that Daniel Turner felt on her chest and urinated on her. (T 50) According to the witness, Defendant came into the bedroom and told Daniel Turner to take the victim out of his bedroom. (T 50) Without specifying the individual or individuals involved in the incidents, the complainant stated "he takes me to the front and then he had me trying on bras and panties." (T 50)

The complainant stated that Daniel Turner was the man who had her trying on clothes. (T 52) The witness testified that Daniel Turner made her sit on his lap and play video strip poker, while he touched the victim's chest. (T 52-54) According to the complainant, when she asked to leave, Daniel Turner said no and knocked her against the wall, causing her to become unconscious. (T 54) The witness then allegedly woke up in the back bedroom on the

bed naked with Daniel Turner on top of her. (T 54) The complainant then described an act of fellatio involving Daniel Turner. (T 55)

The complainant specifically denied that an act of cunnilingus involving Daniel Turner occurred at any time. (T 56) (Cf. PET 16-17) The complainant testified for the first time that Daniel Turner also made her touch his "private part" with her hand. (T 56) The complainant also testified for the first time that Daniel Turner licked her chest when they were playing Pac-Man. (T 57)

The victim stated that after the offense she told her mother that "a man was feeling on me." (T 58) The complainant stated that her mother and father confronted Daniel Turner regarding the alleged incident, and the co-defendant said "I don't know why I did it, I don't know why I did it." (T 58)

The complainant stated that Daniel Turner threatened to kill her if she revealed the incident to anyone. (T 61) The victim described an incident in which both defendants allegedly staged a picture of the complainant stabbing Defendant with a butter knife with jelly on it. (T 61-63)

With only Defendant's jury present, the victim testified on cross-examination that Daniel Turner was alone when he initially abducted her. (T 127-128) The complainant testified that Defendant was in the back room when she was first taken to the apartment but she didn't see him at that time. (T 133) The victim described an act of touching by Daniel Turner which allegedly occurred in the living room while Defendant was in the back bedroom. (T 134-135)

The complainant offered the following description of her initial involvement with Defendant:

"A His brother comes from out the back room and he goes out the door, and then the man with the lipstick, he takes me back in the back room.

Q Okay. Now, let me ask you a couple questions about that. I think you said earlier that you saw Stephen, the man with the beard, come out of the back room?

A Yes.

Q When you say 'the back room,' Lakeysha, do you mean the bedroom?

A Yes.

Q The very last room in the apartment?

A Yes.

Q And I think you said earlier that it looked like Stephen had just woke up?

A Yes.

Q Okay, and he leaves?

A Yes.

Q He leaves out of the apartment?

A Yes.

Q Okay. Does he walk, do you see him walk all the way through the apartment?

A He looked in that closet, the one that's --

Q The closet right here (indicating), outside the bedroom?

A Yes. He gets his shoes and his coat, his jacket, and he goes out the front door.

Q And you saw him leave out the front door?

A Yes.

Q And then he was gone?

A Yes." (T 135-136; emphasis added.)

The complainant testified that after Defendant was gone, Daniel Turner told her to go to the back bedroom. (T 137-138) The victim stated that the act of oral sex with Daniel Turner took place before Defendant returned to the apartment. (T 144) Lakeysha Cage stated that when Defendant came back, she was in the back bedroom. (T 140) When Defendant entered the bedroom, Daniel Turner told Defendant to hold the victim down, and Defendant said no. (T 141) The complainant stated specifically that Defendant did not hold her down. (T 141) The witness testified that after Defendant came back, she played video games with Daniel Turner in the living room, but Defendant went into the back bedroom and didn't play. (T 145, 148)

The complainant testified that it was Daniel Turner, not Defendant, who dragged her from the bedroom to the living room:

"Q When exactly, whether he was dragging you by both hands or by the collar of the shirt, When exactly did he touch your breast?

A When we was playing the video games. He touched my chest and after he touched my chest he started licking my chest.

Q Wait a minute, that's Dan, the man with the lipstick, right?

A Yes.

Q Are you telling us today that it was Dan who dragged you back out of the room?

A Who is Dan?

Q The man with the lipstick.

A Yes.

Q Not Stephen, the man with the beard?

A No." (T 155; emphasis added.)

Regarding the incident with the picture, the complainant stated that the photograph was taken with a Polaroid camera and that a flash was used. (T 156-158) The complainant testified that she thought Daniel Turner "was kind of funny" and that she had previously seen the defendants' apartment door open and peeked in as she walked by. (T 161) (See PET 36-37) The complainant testified that she did not remember her testimony at the preliminary examination that she had "told my little sister that I was going to get a camera and take pictures of them, and she starts giggling at me." (T 162) (See PET 37)

India Harris, age 10, testified that on the day of the offense, the victim told her that "this man was touching her chest and feeling on her private parts." (T 178) The witness stated that the man described by the complainant wore a black wig, a dress, lipstick and make up. (T 179, 183) On cross-examination, the witness testified that the victim told her that the man with the wig and lipstick did things to her. (T 189-190)

Laura VanGenderen, a neighbor, testified that she saw a woman confronting Daniel Turner at his apartment. (T 192-193) Ms. VanGenderen stated that the woman called for "Larry" and a man came running with a piece of metal in his hand. (T 194) On cross-examination, the witness testified that "Larry" asked her "'what

good would I be to my wife and two little girls'" if "'I killed him and I'd be in jail.'" (T 199-200) Ms. VanGenderen stated that she did not see Defendant previously on the date of the offense, or at the time of the confrontation between the woman and Daniel Turner. (T 202)

The complainant's mother, Cynthia Marble, testified that the complainant reported the offense to her and that she and her husband then confronted Daniel Turner. (T 206-207; 221-222) The complainant was taken to St. Mary's Hospital for an examination, but would not agree to a complete pelvic exam. (T 209-210) The complainant told the police that Daniel Turner had vaginally penetrated her. (T 212)[6]

Mrs. Marble testified that she had told the complainant that she might be molested if she went into anyone else's house. (T 216) The witness stated that she owned a Polaroid camera. (T 222-223)

Over a defense objection that the testimony was cumulative, several witnesses testified regarding the confrontation between Daniel Turner and the complainant's parents. (T 225-229; 231-233; 238-239, 246)

Officer Paul Mesman of the Grand Rapids Police Department testified regarding statements made by the complainant about the offense. (T 267, 269-273) Prior to, and during, Officer Mesman's testimony, the trial judge explained the concept of hearsay to the jury. (T 262-265; 268-269) In describing the concept of an

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[6] It was not the prosecutor's theory of the case that Daniel Turner vaginally penetrated the complainant. (See above.)

"excited utterance", the trial judge stated "you can't in the middle of it think about fabricating." (T 264-265) The trial judge informed the jury that Officer Mesman's testimony regarding the complainant's statements to him, satisfied one of the exceptions to the hearsay rule. (T 268-269)

Officer Mesman testified that the complainant told him that while she was in the bedroom, Defendant grabbed one of her arms while Daniel Turner laid on top of her. (T 271-272; Cf. T 141) (See above and see T Prel. Instr. and Opening Statements, 39-41; T 6; 33-40)

Officer Mesman testified that when he first spoke to Daniel Turner, the codefendant said "'Just take me to jail.'" (T 275) When Officer Mesman asked Daniel Turner why he should take him to jail, the codefendant said "'You know, what that girl's accusing me of.'" (T 275)

Officer Mesman testified that the situation at the scene of the offense was confusing. (T 295) The witness stated that the complainant's parents were nearby talking when he questioned her, and both were "very upset." (T 297, 299) Officer Mesman stated that the only thing in his report about Defendant was that Defendant was holding the victim down. (T 300) (Cf. T 141) The witness testified that the complainant appeared confused when he was questioning her. (T 309)

Sergeant Pamela Carrier of the Grand Rapids Police Department testified that the complainant told her that Defendant touched her in the breast area. (T 316, 339) The complainant said that Daniel

Turner threatened her, but did not say that Defendant threatened her. (T 338)

Sergeant Carrier stated that both defendants were placed in a police car when they were arrested. (T 340-341) The witness testified that when the complainant was asked to identify which of the men in the police cruiser was the one who hurt her, she identified Daniel Turner. (T 341)

Officer Michael Barr of the Grand Rapids Police Department testified that Defendant told him "I have been here all day, but I have been sleeping and just woke up." (T 348) Officer Barr stated that the complainant told him that Daniel Turner had vaginally penetrated her. (T 356)

Dr. Steven Perry testified that he examined the complainant at St. Mary's hospital on the date of the alleged offense. (T 386-390) Dr. Perry stated that the victim "alleged that she had been assaulted by a man." (T 388) (See also T 389) The witness testified that there were no signs of injury to the complainant's body. (T 390-391) The complainant refused a pelvic examination, but there were no outward signs of injury to her vagina. (T 392)

On direct examination of Dr. Perry, the prosecutor elicited testimony over defense counsel's objection, that it was not unusual for a child who had been assaulted to refuse a pelvic exam. (T 392-393)

On cross-examination by the defense attorney for the codefendant, Dr. Perry testified that the patient "appeared relaxed and was very pleasant." (T 395) The witness noted that the

complainant was "surprisingly composed for her alleged complaint." (T 396)

Dr. Perry testified that he performed a test which showed no presence of semen on the complainant. (T 409) The witness stated that he saw no injury to the victim's head or neck, and did not smell urine on the patient. (T 413-415) The doctor testified that he had not been told that the complainant was knocked out during the offense. (T 416-417) (Cf. T 54) Dr. Perry stated that when he questioned the complainant about the color of the material that came out of the man's penis, she was vague about it. (T 422)

Nurse Leslie Vandenhout testified that the complainant told her that Daniel Turner threatened her with a knife if she screamed. (T 435) Nurse Vandenhout stated that the Assault Victim Medical Report stated that there was only one assailant involved in the offense. (T 449-450)

On July 19, 1993, the complainant was examined a second time at the Children's Assessment Center. (T 457, 464) Nurse Ruth Hamstra stated that she was present when the complainant told Dr. Edward Cox that the reason she was being examined was because "he licked me down there." (T 458) Nurse Hamstra stated that the complainant denied that any other type of sexual contact took place. (T 460) Dr. Cox testified that the complainant did not report any act of fellatio or fondling. (T 471-472)

Karen Curtiss, a crime scene technician employed by the Grand Rapids Police Department, testified that she gathered evidence at the scene of the offense. (T 477-490) Ms. Curtiss identified a

butter knife in the courtroom which had been seized from a jar of peanut butter in the apartment. (T 543-544 The witness testified that there was peanut butter on the knife, but no jelly. (T 543-544) Ms. Curtiss stated that no Polaroid cameras were seized from the defendants' apartment and no shirts with jelly stains on them were confiscated. (T 544-547)

Robert Birr testified that he worked at the Michigan State Police Crime Lab in Grand Rapids in the microchem trace unit and the serology unit. (T 552) Mr. Birr testified that he examined Defendant's clothes for Negroid hairs because the victim was black. (T 570, 573) The witness found no Negroid hairs on the clothing. (T 570)

Lieutenant James Straub of the Kent County Sheriff's Department testified that he took a statement from Defendant. (T 597-601) Defendant allegedly told Lt. Straub that he was asleep in the bedroom of the apartment when he heard voices. (T 598) Defendant came out of the room and saw the codefendant with a child who was trying on clothes. (T 598-599) Defendant stated that he went back to the room and later left the apartment. (T 599) When he left, Defendant saw the child on Daniel Turner's lap, playing video strip poker. (T 600-601) When Defendant returned, the girl was gone. (T 601) Defendant asked Daniel Turner "'Who was that girl'", and the codefendant responded, "'Kayko.'" (T 601)

Lieutenant Straub testified that Defendant stated he was uncomfortable with the fact that the complainant was trying on

clothes in the apartment. (T 602) Defendant denied touching the complainant. (T 602-603)

Over a hearsay objection by defense counsel, Detective Christine Karpowicz of the Grand Rapids Police Department, testified regarding a statement describing the offense, made by the complainant on July 19, 1993, 12 days after the incident. (T 609-610)

Detective Karpowicz stated that she did not ask the Michigan State Police Crime lab to determine if there was jelly present on the butter knife seized from the apartment. (T 631)

Detective Karpowicz testified that on the date of the offense, Defendant called 911, requesting assistance be sent to his apartment. (T 633-634) Defendant stated that someone was trying to beat in his door. (T 634)

Patricia Ann Haist of the YWCA Counseling Center testified that she supervised the Center's non-familial child molestation program. (T 635-636) Ms. Haist testified that the complainant's behavior of laughing while in the emergency room at the hospital, was consistent with that of a person who had been sexually assaulted. (T 636) The witness, who was not qualified as an expert in rape trauma syndrome, testified that the complainant was "very likely . . . in shock" and "may have been emotional." (T 636) Ms. Haist stated that it was "likely that she was trying to get back in control of her emotions. All of her control was taken away from her <u>when she was assaulted</u>." (T 637; emphasis added.) On

cross-examination, Ms. Haist testified that she did not know the complainant, and had not interviewed her. (T 638)

The parties stipulated that at 5:43 pm on the date of the offense Defendant called the police. Defense counsel played a tape of the 911 call for the jury. (T 642-643)

Detective Debora Vazquez of the Grand Rapids Police Department, testified that the complainant told her that Defendant was not present during any of the acts of sexual penetration or sexual contact by Daniel Turner. (T 677)

Joel Kusmierz testified that on the date of the offense at around 4:30 p.m., he saw a young black girl playing on the steps near his apartment. (T 698) The door to the defendants' apartment was open, and both defendants were inside the apartment. (T 698-699) Mr. Kusmierz stated that when he left his apartment 10 minutes later, the little girl was gone, and the door to the apartment was closed. (T 700)

At the conclusion of the prosecutor's case, defense counsel made a motion for directed verdict of acquittal, arguing that there was insufficient proof that Defendant had aided and abetted Daniel Turner in the CSC I offense. (T 737-740) In ruling on the motion, the trial judge stated that Defendant could be convicted:

> ". . .even though his help may have been only at the tail end. It may not have been to perpetrate the physical acts, but merely to avoid detection. As I say, that is enough." (T 742; emphasis added.)

In his final instructions to the jury on first degree criminal sexual conduct, the trial judge did not specify the offenses with

which Daniel Turner was charged, and did not instruct the jurors that they must be unanimous as to a theory of Daniel Turner's guilt of the offense. (T 823-827)

The jury returned a verdict of guilty as charged as to Stephen Turner. (T Final Day of Jury Trial, 25) The jury in Daniel Turner's case convicted him of kidnapping, and two counts of CSC I. (T Final Day of Jury Trial, 25)

Both defendants appeared for sentencing on February 2, 1994. Daniel Turner, who was charged as an habitual offender, and had a prior conviction for burglary, received three concurrent terms of 30 to 50 years imprisonment. (ST 41) Daniel Turner was sentenced within the guidelines. (See Appendix A.)

The Michigan Sentencing Guidelines as calculated in Stephen Turner's case under the offense title "criminal sexual conduct", scored Defendant as an A-III level offender with a minimum sentence range of 5 to 10 years. (See copy of Sentencing Information Report (SIR) attached to Presentence Investigation Report (PSR), Appendix B.)

Defendant had absolutely no criminal record at the time of the instant offense. Nevertheless, the trial judge departed from the guidelines, and imposed a sentence of 15 to 30 years for the offense of aiding and abetting CSC I. The trial judge stated the departure was necessary in order to avoid sentencing disparity. (ST 39-41)

Mr. Turner appealed of right, and in a nine-page unpublished per curiam opinion released January 6, 1998, the Court of Appeals

vacated Defendant's conviction for CSC I, and remanding for entry of a conviction of aiding and abetting CSC II, and resentencing on that count only. (See attached copy of Court of Appeals opinion, Appendix A.) Mr. Turner's conviction and sentence on the original CSC II conviction were affirmed.

Defendant filed a timely Motion for Rehearing in the Court of Appeals, and in an order entered March 24, 1998, that Court denied the motion. (See attached copy of Court of Appeals order.)

Mr. Turner now brings this Delayed Application for Leave to Appeal.[7]

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[7] The within application is being filed beyond the time specified in MCR 7.302(C)(2)(c). Pursuant to MCR 7.302(C)(3), appellate counsel has attached an Affidavit Explaining Delay. (See attached copy of Affidavit, Appendix C.)

I. **MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT INTRODUCED RAPE TRAUMA SYNDROME TESTIMONY OVER DEFENDANT'S OBJECTION, WHERE THE ISSUE OF THE CHILD VICTIM'S REACTION TO THE ASSAULT WAS NOT INJECTED BY DEFENDANT, AND WHERE THE WITNESS TESTIFIED THAT THE VICTIM WAS IN FACT ASSAULTED.**

Mr. Turner was charged with CSC I and CSC II. Part of the defense theory as to the CSC I, was that the offenses described by the complainant did not in fact occur. (T 20) Defendant's entire defense as to the CSC II charge was that the crime did not take place. (T 19-20)

Dr. Steven Perry testified that he examined the complainant at St. Mary's hospital on the date of the alleged offense. (T 386-390) Dr. Perry stated that the victim "alleged that she had been assaulted by a man." (T 388) (See also T 389) The witness testified that there were no signs of injury to the complainant's body. (T 390-391) The complainant refused a pelvic examination, but there were no outward signs of injury to her vagina. (T 392)

On direct examination of Dr. Perry, the prosecutor elicited testimony over defense counsel's objection, that it was not unusual for a child who had been assaulted to refuse a pelvic exam. (T 392-393)

On cross-examination by the defense attorney for the codefendant, Dr. Perry testified that the patient "appeared relaxed and was very pleasant." (T 395) The witness noted that the complainant was "surprisingly composed for her alleged complaint." (T 396)

Based upon Dr. Perry's testimony, the trial judge ruled that the prosecutor could introduce rape trauma syndrome testimony. (T 398-399; 404-408) Counsel for Defendant argued that the prosecutor had gotten into the question of the child's behavior first and that she had objected. (T 402) (See T 392) Defense counsel noted that she had consistently avoided the kind of questioning summarized above, and stated that she did not open the door to rape trauma syndrome evidence, the codefendant's attorney did. (T 402-403) In his ruling on the issue, the trial judge stated that it "would be too easy to set things up, have one lawyer object, and the other say, 'I want to let it in for one reason or another,' and we'd have constant problems." (T 406) (Cf. T 392)

Thereafter, Patricia Ann Haist of the YWCA Counseling Center testified that she supervised the Center's non-familial child molestation program. (T 635-636) Ms. Haist testified that the complainant's behavior of laughing while in the emergency room at the hospital, was consistent with that of a person who had been sexually assaulted. (T 636) The witness testified that the complainant was "very likely . . . in shock" and "may have been emotional." (T 636) Ms. Haist stated that it was "likely that she was trying to get back in control of her emotions. All of her control was taken away from her when she was assaulted." (T 637; emphasis added.) On cross-examination, Ms. Haist testified that she did not know the complainant, and had not interviewed her. (T 638)

In his closing argument to the jury, the prosecutor argued the rape trauma syndrome evidence and noted that the attorney for the codefendant had injected the issue of the child's post-incident behavior. (T 847-848)

Defendant now contends that he was denied a fair trial when the trial court introduced rape trauma syndrome testimony over Defendant's objection, where the issue of the child victim's reaction to the assault was not injected by Defendant, and where the expert witness testified that the victim was in fact assaulted.

* * *

Standard of Review

The within issue raises a claim that the trial court improperly admitted rape trauma syndrome evidence over the objection of defense counsel for Stephen Turner. A trial court's decision to admit evidence is reviewed by an appellate court for an abuse of discretion.

* * *

In People v Beckley, 434 Mich 691; 456 NW2d 391 (1990), a plurality opinion, the Michigan Supreme Court concluded that, in sexual abuse cases, a behavioral expert must function primarily in the role of advisor. The advice of the expert is required only if: (1) particular behavior of the complainant following the rape is at issue; (2) it is necessary to rebut inferences regarding post-incident behavior of the complainant which is at issue; and (3) the

testimony is limited to background information on the behavior the victim is likely to exhibit following a rape. Id. The expert may not testify that the assault actually occurred or render the opinion that particular behavior that was observed indicates that a sexual assault in fact occurred. Id., pp 725 (Brickley, J.), 734 (Boyle, J., concurring in part, dissenting in part)."

In the instant case, it was the prosecutor who first injected the issue of the complainant's post-incident behavior when he asked Dr. Perry whether it was unusual for a child who had been sexually assaulted to refuse a pelvic exam. (See above.) Significantly, this testimony was objected to by defense counsel for Stephen Turner. (T 392) The issue of the victim's post-incident behavior was then fully explored by defense counsel for Daniel Turner.

However, as defense counsel for Defendant Stephen Turner noted, she had consistently sought to steer clear of this area, and had objected at the first indication that the prosecutor was inquiring into the child's post-incident behavior. (T 402-403)

Based on this record, it is clear that the prosecutor and defense counsel for Daniel Turner were the persons who injected this issue. This was done over defense objection. Therefore, this is not a case where the introduction of rape trauma syndrome evidence was "necessary to rebut inferences regarding post-incident behavior of the complainant."

Moreover, the testimony actually admitted exceeded the permissible scope of this type of evidence. Beckley, supra. The witness testified that the complainant was "very likely . . . in

shock" and "may have been emotional." (T 636) Ms. Haist stated that it was "likely that she was trying to get back in control of her emotions. All of her control was taken away from her when she was assaulted." (T 637; emphasis added.)

The Court of Appeals rejected the within issue, stating as follows:

> "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)." Slip op., p 8.

What the Court of Appeals did not say in addressing this issue, was that Defendant had complained on appeal that the testimony actually elicited exceeded the permissible scope of "rape trauma syndrome" evidence. People v Beckley, 434 Mich 691; 456 NW2d 391 (1990).[8] The so-called expert in the instant case testified that the complainant "was assaulted." (T 637)[9] This testimony

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[8] People v Beckley, supra, was a plurality opinion.

[9] The expert did not know the complainant, and had not interviewed her. (T 638)

exceeded the permissible scope of rape trauma syndrome testimony. Beckley, supra, at 725.

Moreover, the Court of Appeals conclusion that Mr. Turner's attorney did not object "soon enough" simply cannot be squared with the record. Defendant's attorney objected at every available opportunity, and vigorously sought to avoid having the issue of the complainant's post-incident behavior injected. (See above.)

Because a witness was permitted to testify over defense objection in a manner which exceeded the permissible scope of rape trauma syndrome testimony, Defendant's convictions must be reversed.

II. MANIFEST REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT ADMITTED DAMAGING HEARSAY TESTIMONY OVER DEFENSE OBJECTION.

Over a hearsay objection by defense counsel, Detective Christine Karpowicz of the Grand Rapids Police Department, testified regarding a statement describing the offense, made by the complainant on July 19, 1993, 12 days after the incident:

> "Q And what information did you obtain from Lakeysha?
>
> A I spoke to her about what had took place on that night, and she described some detail of what happened.
>
> Q What detail would that have been, please?
>
> A She described --
>
> MS. KRAUSE: Your Honor, I'm going to object to the statements Lakeysha made to Detective Karpowicz some twelve days later as hearsay.
>
> THE COURT: In the context of this overall case, the objection is overruled.
>
> BY MR. BRAMBLE:
>
> Q What type of detail did she provide you?
>
> A If I could refer to those notes, what she had told me was that she was making stuff and was grabbed by a male with lipstick, dragged into his apartment, back bedroom.
>
> Her clothes were off and his clothes were off, and he got on top of her. She told me that he touched her privates with his hands.
>
> She said that his brother had come in the room, and the one with the lipstick had told the other brother to hold her down, and he refused, so the one without the lipstick dragged her into the living room, where he held her down and rubbed her chest.

> From there I asked her how she knew the brother -- or why did he hold her down, the one without the lipstick, and she told me that he thought his brother still wanted him to.
>
> I said 'Did he want to,' and she said, 'No.'" (T 609-610) (Emphasis added.)

Defendant now contends that manifest reversible error occurred when the trial court admitted damaging hearsay testimony over defense objection.

* * *

Standard of Review

The within issue raises a claim that the trial court improperly admitted hearsay testimony over the objection of defense counsel for Stephen Turner. A trial court's decision to admit evidence is reviewed by an appellate court for an abuse of discretion.

* * *

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Its admission is generally barred because there is no opportunity to cross-examine the out-of-court declarant. People v Burton, 177 Mich App 358, 362; 441 NW2d 87 (1989).

MCR 803A, states in part as follows:

> "A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;

(2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." (Emphasis added.)

In People v Stricklin, 162 Mich App 623, 627-630 (1987), a husband and wife were convicted of engaging in various sexual acts with two of their children. 162 Mich App 623, 626-627. The trial court permitted three adult witnesses to testify to conversations each had with the children in which the children described the offenses. 162 Mich App 623, 627. The judge in Stricklin stated that it was "his practice to allow police officers and other investigators to recite for the jury what witnesses had told them at earlier stages of the investigation in order to allow the jury to fully evaluate the credibility of the witnesses." 162 Mich App 623, 627.

The Court of Appeals in Stricklin reversed, finding no applicable exception to the hearsay rule, and citing the credibility of the witnesses as a factor in its decision:

> "Defendants claimed that the children had been sexually promiscuous following the female child's sexual molestation and had been caught engaging in sexual activities with each other and neighborhood children. Both defendants further claimed that the children were sexually aggressive towards themselves and other adults. Given the conflicting testimony, the credibility of the witnesses was crucial to the jury's verdict. Under such circumstances, we find that it was error requiring reversal to bolster the testimony of the children by allowing three witnesses to corroborate their testimony. See People v Gee, 406 Mich 279, 283; 278 NW2d 304 (1979). Defendants' convictions are reversed and the case remanded for a new trial." 162 Mich App 623, 629-630. (Emphasis added).

In People v Eady, 409 Mich 356, 359 (1980), the defendant was convicted of second-degree criminal sexual conduct and assault with intent to commit criminal sexual conduct not involving penetration. The defendant's defense at trial was consent. The complainant testified she picked up the defendant in her car and later he began to assault her. She stated she began to scream and honk her horn. Id. at 359-360. A police officer was permitted to testify to hearsay statements in a radio run regarding a woman screaming and honking her horn. Id. at 360. The Michigan Supreme refused to find harmless error in the admission of the hearsay statements.

In the instant case, Lakeysha Cage testified that her birthday was March 16, 1983. (T 45) The offense allegedly occurred on July 7, 1993, and the complained-of statement was made on July 19, 1993. (T 606-610) Because the complainant was ten years old at the time

that the statement was made, the tender years exception contained in MRE 803A, is inapplicable to the instant case. (See above.) The exception is also inapplicable because the statement was one of many made by the complainant and "only the first is admissible under this rule [MRE 803A]." Moreover, the statement was not "shown to have been spontaneous" as required by 803A(2). In addition, the notice requirements of 803A were not met here. (See text of rule quoted above.)

There was no effort made by the prosecutor or the trial judge to justify the admission of the complainant's out-of-court statement to Detective Karpowicz as an excited utterance. Nor could there have been such a justification in light of the fact that the statement was made 12 days after the offense. (See above.) See People v Kreiner, 415 Mich 372, 378-379; 329 NW2d 716 (1982).

The out-of-court statement was extremely damaging because it tended to directly support the complainant's allegations regarding both offenses charged against Defendant.

Therefore, damaging hearsay testimony was admitted over defense objection. The trial court's only ruling on the subject indicated that he was admitting the evidence "[i]n the context of this overall case." (T 609) Whatever this statement means, it cannot justify the admission of otherwise inadmissible hearsay testimony.

The Court of Appeals has specifically found error in the admission of the above-described hearsay testimony, but has determined that the error was harmless:

> "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 Rodriquez, (On Remand), 216 Mich App 329, 332; 549 NW2d 359 (1996)." (Slip op., p 8).

Although not stated in the Court of Appeals opinion, the out-of-court statements at issue here were made to a police witness. The admission of the hearsay testimony described above was not harmless, because it tended to bolster the credibility of the complainant as to the specific allegations related in the out of court statements. Stricklin. The concept that hearsay testimony was "merely cumulative" threatens to swallow up the hearsay rule, violates Stricklin, and ignores the impact on the jury when a police officer testifies that the complainant told him the same thing she is telling the jurors.

Defendant's conviction must be reversed.

III. **MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE GAVE A CIRCULAR INSTRUCTION ON THE INTENT REQUIRED FOR AIDING AND ABETTING WHICH FAILED TO CONVEY TO THE JURY THAT THE ACCESSORY MUST ASSIST THE PRINCIPAL WITH KNOWLEDGE OF THE CRIME INTENDED BY THE PRINCIPAL.**

In his preliminary instructions to the jury, the trial judge instructed them that the intent required for aiding and abetting an offense, was "the specific intent that your assistance would indeed aid them":

> "Simply encouraging the person on, even though you don't do anything physical, but you eeg [sic] them on, or encourage them to do it or help them plan. All of those things, while they aren't actually committing the ultimate crime, are assisting enough to make the person who assisted equally guilty with the person who actually carries out the crime, provided that the person who helped meant for his help to be of some assistance.
>
> Now if you help someone unwittingly, by accident, not knowing that you are helping them, that's no crime, even though you did, in fact, help. You have to help and you have to have help with the specific intent that your assistance would indeed aid them in carrying out their particular crime.
>
> And if those things are proven, number one, that Mr. Daniel Turner did, in fact commit one of those Criminal Sexual Conduct offenses that we're talking about, and that Mr. Stephen Turner did help him, and that he intended to help him, actually help him, then the crime of Aiding and Abetting Criminal Sexual Conduct in the First or Second Degrees has happened, depending upon whichever offense you think has, in fact, happened." (T Prel. Instr. and Opening Statements, 40-41; emphasis added.)

In his final instructions to the jury on aiding and abetting, the trial judge stated as follows:

"What the prosecution must prove is that Stephen Turner did some affirmative act which helped his brother in some way commit whatever offense you decide his brother committed, if you find that he did.

No particular amount of help need be proven, so long as the help was more than insignificant. The law doesn't deal with 'insignificant,' but if it was more than insignificant, whatever it was, it constituted enough help."

* * *

But proving that a crime occurred at the hands of Daniel Turner and that Mr. Stephen Turner helped in one of these ways is still not enough. The prosecution has to prove one more thing.

It has to prove that Mr. Stephen Turner meant for his help to indeed assist in the commission of the crime. He has to have wanted his brother to abe able to succeed with the crime, and to have done whatever he did in assisting it with that purpose in mind.

* * *

In sum, before you can find Mr. Stephen Turner guilty of aiding and abetting his brother, you've got to find three things beyond a reasonable doubt.

Number one, that Daniel Turner committed either criminal sexual conduct in the first degree or criminal sexual conduct in the second degree.

Number two, that Stephen Turner did something affirmative to help his brother commit one of those offenses.

And three, that Stephen Turner intended that his brother commit one of those offenses, and intended that what his help was, whatever it was, was going to assist.

If you help someone inadvertently, not meaning to, not knowing that you're going to, then, of course, it's not a crime. So you have to have

> meant for your assistance to in fact be assistance.
>
> * * *
>
> So if you're satisfied that Daniel Turner committed one of the two offenses that I've talked about, and that his brother helped him, intending to help him, then you may find him guilty of aiding and abetting whatever offense you're satisfied Daniel committed." (T 829-831; 833-834; emphasis added.)

Defendant now contends that he was denied a fair trial when the trial judge gave a circular instruction on the intent required for aiding and abetting, which failed to convey to the jury that the defendant must assist the principal with knowledge of the crime intended by the principal.

* * *

Standard of Review

The within issue raises a claim that the trial judge gave the jury an erroneous instruction on the law relating to Defendant's case. An appellate court reviews questions of law de novo. Cardinal Mooney HS v MHSAA, 437 Mich 75, 80; 467 NW2d 21 (1991); Jodway v Kennametal, Inc, 207 Mich App 622, 632; 525 NW2d 883 (1994).

* * *

In People v Murray, 72 Mich 10, 16; 40 NW 29 (1888), the Michigan Supreme Court observed that in a criminal case, the trial judge has the responsibility to see that the case goes to the jury in an intelligent manner so that the jurors can have a clear and correct understanding of what it is they are to decide. See also

People v Visel, 275 Mich 77; 265 NW 781 (1936); People v Liggett, 378 Mich 706, 714; 148 NW2d 784 (1967).

MCL 767.39; MSA 28.979, states as follows:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

The above-quoted statute "'makes a defendant a principal when he consciously shares in any criminal act.'" People v Cooper, 326 Mich 514, 522; 40 NW2d 708 (1950). [See People v Penn, 70 Mich App 638, 649; 247 NW2d 575 (1976) ["Knowledge of the principal's criminal purpose and a conscious sharing of the act are necessary].

In People v Palmer, 392 Mich 370, 378; 220 NW2d 393 (1974), the Michigan Supreme Court described the concept of aiding and abetting as follows:

> "In criminal law the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. 22 CJS, Criminal Law, § 88(2), p 261. The amount of advice, aid or encouragement is not material if it had the effect of including the commission of the crime. People v Washburn, 285 Mich 119, 126; 280 NW 132 (1938). (Emphasis added.)

In People v Gordon, 60 Mich App 412, 417-418; 231 NW2d 409 (1975), the evidence showed that the defendant was in an automobile with stolen property shortly after a robbery. It was not the

prosecutor's theory that the defendant in Gordon participated directly in the robbery or drove the car. Id. The Court of Appeals found that the evidence was insufficient to support the defendant's conviction of unarmed robbery stating as follows:

> "Beyond the pyramiding of inferences problem, the evidence is insufficient from a purely common sense approach. One aids and abets another to commit a crime when the former takes conscious action to seek to make the criminal venture succeed. People v Cooper, 326 Mich 514; 40 NW2d 708 (1950). There has been no evidence to show that defendant Broaden either knew of his associates' wrongful purpose or took any action to further that purpose. Both elements are required to find aiding and abetting. People v Poplar, 20 Mich App 132; 173 NW2d 732 (1969)." 60 Mich 412, 417-418. (Emphasis added.)

See also People v Wright (On Remand), 99 Mich App 801, 820; 298 NW2d 857 (1980) ["one aids and abets another to commit a crime where the former takes conscious action seeking to make the criminal venture succeed"].

In People v Evans, 173 Mich App 631, 636; 434 NW2d 452 (1988), the Court of Appeals stated as follows:

> "In order to aid and abet, defendant must have performed acts or given encouragement which aided and assisted in the commission of the crime. Furthermore, the aider and abettor must have intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement." (Emphasis added.)

See also People v Acosta, 153 Mich App 504, 512; 396 NW2d 463 (1986).

In the instant case, the trial judge repeatedly instructed the jury that the intent required for aiding and abetting is a

"specific intent that your assistance would indeed aid them." (See above.) The only import of the trial court's intent instructions was to convey to the jury that a person cannot be convicted if he aided and abetted another "by accident."

The defense presented in this case was reasonable doubt. Mr. Turner alleged that he did now know what his brother was doing, and did not participate in the offenses in any way. Therefore, it was critical that the jury be instructed that: "Knowledge of the principal's criminal purpose and a conscious sharing of the act are necessary." People v Penn, supra at 649.

By failing to instruct the jury on the intent necessary for the crime, the trial court failed in its duty "to see that the case goes to the jury in an intelligent manner so that the jurors can have a clear and correct understanding of what it is they are to decide." Murray, supra, at 16.

Had the jury acquitted Stephen Turner of CSC I, but convicted him of aiding and abetting CSC II, Defendant could have argued on appeal that the intent instructions for CSC II were erroneous. The disposition of Defendant's sufficiency issue by the Court of Appeals leaves Defendant in no different position. The Court of Appeals has not specifically held that the issue is moot. They have simply not addressed it at all. However, the issue is not moot. Stephen Turner was entitled to proper instructions on the offense of which he was ultimately convicted.

Defendant's conviction for aiding and abetting second degree criminal sexual conduct must be reversed.

IV. MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT THE ASSISTANCE OFFERED BY DEFENDANT MUST HAVE HAD THE EFFECT OF INDUCING THE CRIME.

In his instructions to the jury on the amount of help the aider and abettor must provide, the trial court stated as follows:

> "What the prosecution must prove is that Stephen Turner did some affirmative act which helped his brother in some way commit whatever offense you decide his brother committed, if you find that he did.
>
> No particular amount of help need be proven, so long as the help was more than insignificant. The law doesn't deal with 'insignificant,' but if it was more than insignificant, whatever it was, it constituted enough help." (T 829-830; emphasis added.)

At no time did the trial judge instruct the jury that the assistance provided by the aider and abettor must have had the effect of inducing the crime.

Mr. Turner now contends that the trial judge denied him a fair trial when it failed to instruct the jury that the assistance provided by the aider and abettor must have had the effect of inducing the crime.

* * *

Standard of Review

The within issue raises a claim that the trial judge gave the jury an erroneous instruction on the law relating to Defendant's case. An appellate court reviews questions of law de novo. Cardinal Mooney HS v MHSAA, 437 Mich 75, 80; 467 NW2d 21 (1991); Jodway v Kennametal, Inc, 207 Mich App 622, 632; 525 NW2d 883 (1994).

* * *

In People v Murray, 72 Mich 10, 16; 40 NW 29 (1888), the Michigan Supreme Court observed that in a criminal case, the trial judge has the responsibility to see that the case goes to the jury in an intelligent manner so that the jurors can have a clear and correct understanding of what it is they are to decide. See also People v Visel, 275 Mich 77; 265 NW 781 (1936); People v Liggett, 378 Mich 706, 714; 148 NW2d 784 (1967).

MCL 767.39; MSA 28.979, states as follows:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

The above-quoted statute "'makes a defendant a principal when he consciously shares in any criminal act.'" People v Cooper, 326 Mich 514, 522; 40 NW2d 708 (1950). [See People v Penn, 70 Mich App 638, 649; 247 NW2d 575 (1976) ["Knowledge of the principal's criminal purpose and a conscious sharing of the act are necessary"].

In People v Palmer, 392 Mich 370, 378; 220 NW2d 393 (1974), the Michigan Supreme Court described the concept of aiding and abetting as follows:

> "In criminal law the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal,

> for the purpose of rendering assistance, if necessary. 22 CJS, Criminal Law, § 88(2), p 261. The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime. People v Washburn, 285 Mich 119, 126; 280 NW 132 (1938)." (Emphasis added.)

In the instant case, Mr. Turner argued at trial that there was insufficient evidence presented to convict him of aiding and abetting. Therefore, it was critical that the jury be told that the amount of assistance offered by Mr. Turner was not material, so long as it had the effect of inducing the crime. Palmer, supra.

Had the jury acquitted Stephen Turner of CSC I, but convicted him of aiding and abetting CSC II, Defendant could have argued on appeal that the intent instructions for CSC II were erroneous. The disposition of Defendant's sufficiency issue by the Court of Appeals leaves Defendant in no different position. The Court of Appeals has not specifically held that the issue is moot. They have simply not addressed it at all. However, the issue is not moot. Stephen Turner was entitled to proper instructions on the offense of which he was ultimately convicted.

Because the trial court failed to adequately instruct the jury on the concept of aiding and abetting, this Court must reverse Defendant's conviction for aiding and abetting second degree criminal sexual conduct.

V. **CLEAR REVERSIBLE ERROR OCCURRED WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT IT MUST BE UNANIMOUS AS TO A THEORY OF THE PRINCIPAL'S GUILT BEFORE IT COULD FIND STEPHEN TURNER GUILTY AS AN AIDER AND ABETTOR.**

Stephen Turner was charged with aiding and abetting his brother, Daniel Turner, in the commission of the crime of first degree criminal sexual conduct. Although Daniel Turner was charged with two counts of CSC I, Stephen Turner was charged with only one count of aiding and abetting. (T 820-821) (See Statement of Facts, supra.)

In his instructions to the jury on the offense of CSC II, the trial judge did not inform the jurors that they must be unanimous as to a theory of Daniel Turner's guilt of that offense. (T 822-823; 826-829)

Defendant now contends that clear reversible error occurred when the trial judge failed to instruct the jury that they must be unanimous as to a theory of the guilt of the principal before Defendant could be convicted as an aider and abettor.

Standard of Review

The within issue raises a claim that Mr. Turner was denied his right to a fair trial based upon a trial court instruction. There was no objection by defense counsel to the complained-of instruction. Therefore, this Court should review this issue under a manifest injustice standard. People v Grant, 445 Mich 535; 520 NW2d 123 (1994); MCL 769.26; MSA 28.1096

* * *

In People v Yarger, 193 Mich App 532, 536-537; 485 NW2d 119 (1992), defendant was charged with one count of third degree criminal sexual conduct (CSC III). However, the complainant's trial testimony, if believed by the jury, would have supported two separate convictions of third degree criminal sexual conduct, each based on a separate sexual penetration. Id. The jury was not instructed that it had to be unanimous as to a theory of CSC III in order to convict the defendant. Id. The Court of Appeals reversed:

> "Unless waived by a defendant, the right to a jury trial includes the right to a unanimous verdict. People v Burden, 395 Mich 462, 468; 236 NW2d 505 (1975) (opinion by Kavanagh, C.J.); People v Miller, 121 Mich App 691; 329 NW2d 460 (1982). In this case, we find it impossible to discern of which act of penetration defendant was found guilty. This problem has been previously alluded to in dicta by this Court. People v Pottruff, 116 Mich App 367, 375-376; 323 NW2d 402 (1982). See also People v Jenness, 5 Mich 305, 326-329 (1858), and People v Thorp, unpublished opinion per curiam of the Court of Appeals, decided March 7, 1991 (Docket No. 112554). We now conclude that the error requires that defendant's conviction be reversed. If this case is retried, defendant should either be charged with two separate counts of third-degree criminal sexual conduct or else an appropriate instruction should be given to the jury." 153 Mich App 532, 537. (Emphasis added.)

In People v Cooks, 446 Mich 503, 524; 521 NW2d 275 (1994), the Michigan Supreme Court stated as follows:

> "We are persuaded by the foregoing federal and state authority that if alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct

> (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." (Footnote omitted.)

In the present case, the jurors may have agreed on Daniel Turner's guilt, but may not have been unanimous on the acts supporting that finding.

Although defense counsel did not object to the instructions as given, this Court may reverse where, as here, the failure to give a special instruction may have undermined a fundamental constitutional right. People v Townes, 391 Mich 578, 586; 218 NW2d 136 (1974); Berrier v Egeler, 583 F2d 515, 516 (CA 6 1978). It is constitutional error to allow Defendant Turner's conviction to stand where six jurors may have chosen one event or theory on which to predicate guilt, while six others chosen a different event and theory.

The Court of Appeals opinion also Defendant's argument that he was denied a fair trial when the trial judge failed to instruct the jury that it must be unanimous regarding which specific act of CSC I committed by Daniel Turner formed the basis for convicting Stephen Turner of aiding and abetting CSC I. (Slip op. pp 7-8) The Court found the issue was moot in light of its disposition of the sufficiency issue. (Slip op. p 8) However, the trial judge also failed to instruct the jury that they had to be unanimous as to a theory of CSC II. (T 825-826) Therefore the issue is not moot. Had the jury acquitted Stephen Turner of CSC I, but convicted him of

aiding and abetting CSC II, Defendant would still have been entitled to a unanimity instruction. People v Cooks, supra.

Because the trial court failed to instruct the jury that they must unanimously agree on the same act and theory in support of their verdict, Defendant's conviction for aiding and abetting second degree criminal sexual conduct must be reversed.

VI. **MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR ARGUED TO THE JURY THAT THEY HAD A CIVIC DUTY TO BELIEVE THE TESTIMONY OF THE COMPLAINING WITNESS.**

In his closing rebuttal argument to the jury, the prosecutor stated as follows:

> "Well, there's a poet that once said that 'Each child born today is God's expression of hope for the future.'
>
> What hope does Lakeysha Cage have or any child have when she tells someone, 'This adult hurt me,' and we don't believe 'em?" (T 878; emphasis added.)

Mr. Turner now contends that the prosecutor denied him a fair trial by arguing to the jury that they had a "civic duty" to believe the testimony of the complaining witness.

Standard of Review

The within issue raises a claim that Mr. Turner was denied his right to a fair trial based upon the prosecutor's misconduct. There was no objection by defense counsel to the complained-of argument by the prosecutor. Therefore, this Court should review this issue under a manifest injustice standard. People v Grant, 445 Mich 535; 520 NW2d 123 (1994); MCL 769.26; MSA 28.1096.

* * *

In People v Rohn, 98 Mich App 593, 596-597; 296 NW2d 315 (1980), the Court of Appeals held that a prosecutor may not inject matters broader than the guilt or innocence of the defendant, including especially appeals to civic duty:

> "Prosecutors are accorded great latitude regarding their arguments and conduct. See

> People v Duncan, 402 Mich 1; 260 NW2d 58 (1977). However, it is paramount that prosecutors pursue any lawsuit with as equal a concern for ensuring a defendant a fair trial as for convicting him. People v Florinchi, 84 Mich App 128, 135; 269 NW2d 500 (1978). A defendant's opportunity for a fair trial may be jeopardized when the prosecution interjects issues broader than the guilt or innocence of the accused. People v Bryan, 92 Mich App 208, 221; 284 NW2d 765 (1979). This is particularly true when the prosecutor appeals to a jury's civic duty." 98 Mich App 593, 596-597. (Emphasis added.)

In People v Biondo, 76 Mich App 155, 157-160; 256 NW2d 60 (1977), the prosecutor appealed to the jury to convict the defendant of breaking and entering, as an act towards saving the City of Detroit from financial ruin. The prosecutor in Biondo, supra, also stated that the complainant had a right as a citizen to expect a guilty verdict from the jury:

> "'I indicated to you at the beginning of my closing argument that everybody is entitled, everybody's got rights.
>
> * * *
>
> Now the complainant Mr. Schwall is a businessman here in town. Being a businessman here in this city, he supplies people in the city. He pays taxes in the city. He belongs to groups in the city.
>
> And he comes into this courtroom, and he says I accuse Salvatore Biondo of going into my greenhouse and taking my stuff, my goods that I paid for, that I worked hard for; and he's saying to you, ladies and gentlemen, I'm a citizen just like you are, he took my goods, they were in his car, he did all these things; and he's saying to you, as he is entitled to say to you, what are you going to do about it.'" 76 Mich App 155. (Emphasis added.)

The Court in Biondo reversed the defendant's conviction based in part on the above-quoted argument, stating as follows:

> "The 'civic duty' tactic of jury argument has been repeatedly condemned by this Court as prejudicial since it injects into a trial issues unrelated to the particular defendant's case. In People v Farrar, 36 Mich App 294, 298-299; 193 NW2d 363 (1971), the Court adopted the language of the ABA Project on Standards for Criminal Justice, The Prosection Function, Std. 5.8(d), as applicable to this issue:
>
> > 'The prosecutor may not subtly convert the presumption of innocence into a presumption of guilt by appealing to the jurors to perform a civic duty to support the police:
> >
> > The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.'"

In the instant case, the prosecutor argued to the jury that it had a duty to believe the testimony of the complainant. (See above.) This argument was very similar to the prosecutor's argument in Biondo, supra, where the prosecutor told the jury that the victim was a hard-working taxpayer who had been the victim of a crime and who had a right to come before the jury and say "what are you going to do about it.'" 76 Mich App 155. (Emphasis added.)

The Court of Appeals opinion in the instant case simply failed to address this issue in any way. This action on the part of the Court denied Mr. Turner his state constitutional right to appeal. Const 1963, art 1, § 20.

Because the prosecutor appealed to civic duty to convict, Mr. Turner's convictions must be reversed.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant **STEPHEN DENNIS TURNER** respectfully requests that this Honorable Court reverse in part the judgment of the Court of Appeals, vacate his conviction for aiding and abetting second degree criminal sexual conduct and remand this case for a new trial or resentencing on the remaining count of second degree criminal sexual conduct. In the alternative, Defendant requests that this Court remand this case for a new trial on both counts of second degree criminal sexual conduct. In the alternative, Defendant requests that this Court remand this case for resentencing on both counts. In the alternative, Defendant requests that this Court grant leave to appeal on the issues raised herein.

Respectfully submitted,

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A P P E N D I X A

The Court of Appeals Opinion

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C. J. BOOKER

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APPELLATE DEFENDER OFFICE

STATE OF MICHIGAN

COURT OF APPEALS

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.

Docket No. 172928

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).

Docket No. 173814

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 complaint by Daniel Turner. Although the complaint 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."

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.

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.

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 Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

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).

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

[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).

A P P E N D I X B

The Court of Appeals Order Denying Motion For Rehearing

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CJB

Court of Appeals, State of Michigan

ORDER

People of MI v Stephen Dennis Turner

Docket No. 173814

LC No. 93-063014 FC

Mark J. Cavanagh
Presiding Judge

Donald E. Holbrook, Jr.

Kathleen Jansen
Judges

The Court orders that defendant-appellant's motion for rehearing is DENIED.

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

MAR 24 1998
Date

Chief Clerk