

STATE APPELLATE DEFENDER OFFICE

SUITE 3300 PENOBSCOT • 645 GRISWOLD • DETROIT, MICHIGAN 48226-4215 • 313/256-9833 • FAX 313/965-0372

CLIENT CALLS 313/256-9822

JAMES R. NEUHARD
DIRECTOR

NORRIS J. THOMAS, JR.
CHIEF DEPUTY DIRECTOR

DAWN VAN HOEK
LEGAL RESOURCES DIRECTOR



F. MARTIN TIEBER
DEPUTY DIRECTOR, LANSING

SHEILA ROBERTSON DEMING
SPECIAL UNIT DIRECTOR

LANSING OFFICE
340 BUSINESS AND TRADE CENTER
200 WASHINGTON SQUARE, NORTH
LANSING, MICHIGAN 48913
517/334-6069 • FAX 517/334-6987

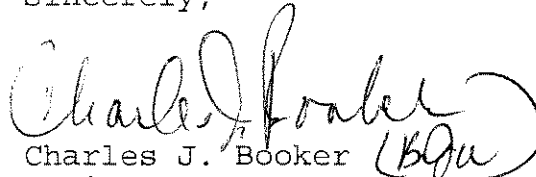
January 27, 1998

Mr. Stephen D. Turner
No. 235530
Carson City Regional Facility
10522 Boyer Road
P. O. Box 5000
Carson City, MI 48811-5000

Dear Mr. Turner:

Enclosed please find a copy of the Motion for Rehearing I filed on your behalf in the Michigan Court of Appeals.

Sincerely,


Charles J. Booker (BJW)
Assistant Defender

Enclosure

CJB:bjw

cc: File

STATE APPELLATE DEFENDER OFFICE

SUITE 3300 PENOBSCOT • 645 GRISWOLD • DETROIT, MICHIGAN 48226-4215 • 313/256-9833 • FAX 313/965-0372

CLIENT CALLS 313/256-9822

JAMES R. NEUHARD
DIRECTOR

NORRIS J. THOMAS, JR.
CHIEF DEPUTY DIRECTOR

DAWN VAN HOEK
LEGAL RESOURCES DIRECTOR



F. MARTIN TIEBER
DEPUTY DIRECTOR, LANSING

SHEILA ROBERTSON DEMING
SPECIAL UNIT DIRECTOR

LANSING OFFICE
340 BUSINESS AND TRADE CENTER
200 WASHINGTON SQUARE, NORTH
LANSING, MICHIGAN 48913
517/334-6069 • FAX 517/334-6987

January 27, 1998

Clerk
Court of Appeals
350 Ottawa N.W.
Grand Rapids, MI 49503

Re: People v Stephen Dennis Turner
Court of Appeals No. 173814 & 172928
Lower Court No. 93-63014-FCB

Dear Clerk:

Enclosed for filing are the original and four (4) copies of the Notice of Hearing, **MOTION FOR REHEARING**, Affidavit and Proof of Service.

Thank you for your cooperation.

Sincerely,

C. Joseph Booker

C. Joseph Booker
Assistant Defender

kt
Enclosures

cc: Kent County Prosecutor

Mr. Stephen Dennis Turner
File

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 173814

Lower Court No. 93-63014-FCB

- vs -

STEPHEN DENNIS TURNER

Defendant-Appellant.

KENT COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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

NOTICE OF HEARING
MOTION FOR REHEARING
AFFIDAVIT
PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 173814

Lower Court No. 93-63014-FCB

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.

NOTICE OF HEARING

TO:

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

PLEASE TAKE NOTICE that on February 10, 1998, the undersigned will move this Honorable Court to grant the within MOTION FOR REHEARING.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:

C. Joseph Booker

C. JOSEPH BOOKER (P31885)

Assistant Defender

3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Date: January 27, 1998

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 173814

Lower Court No. 93-63014-FCB

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.

MOTION FOR REHEARING

Defendant-Appellant **STEPHEN DENNIS TURNER**, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by his counsel **C. JOSEPH BOOKER**, respectfully moves this Honorable Court to grant rehearing in this matter, and states in support thereof as follows:

1. 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.)

2. In a nine-page unpublished per curiam opinion released January 6, 1998, this Court 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.)

3. Defendant now contends that the Court of Appeals opinion in this matter is palpably defective. Defendant requests rehearing and contends that he is minimally entitled to reversal of the aiding and abetting CSC II conviction, entry of which was ordered by this Court. Defendant further contends that he is clearly entitled to resentencing on the remaining count of CSC II.

4. As this Court 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) This Court 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)

5. Having rejected the prosecutor's theory of guilt on the charged offense of CSC I, this Court 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 interview¹ 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)

6. Defendant contends that the Courts 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 S Ct 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 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 S Ct 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."

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

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

7. Although it was never clear what Stephen Turner was supposed to have done to make him guilty of CSC I², 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.

8. Moreover, once this Court vacated Stephen Turner's conviction for CSC I, Defendant clearly became entitled to 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. This Court 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,

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.)

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).

9. 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.

10. 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.

11. 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.

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

13. Defendant also requests that this Court strike footnote 5 from its opinion, on the basis that the footnote is totally unnecessary to the resolution of Defendant's Milbourn³ issue, and constitutes an advisory opinion on a criminal matter not before the Court.

14. Defendant argued before this Court that his 15-year minimum sentence for CSC I constituted an abuse of the sentencing Court's discretion. (See Issue IX, Brief on Appeal.) This Court 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, this Court 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 aiding and abetting first-

³ People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990).

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

15. Thus, the Court has held essentially that Stephen Turner is legally innocent of CSC I, but if he were guilty 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 inconsistent with those found by the Court. 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 this Court has inexplicably refused to order a resentencing on both counts, and has refused to explain its decision.

16. Defendant also objects to this Court's failure/refusal to address Issue VIII of Defendant's Brief on Appeal. This Court has seen fit to issue an opinion on a matter not before it (see above), it should issue an opinion on the claims that are before it.

WHEREFORE, for the reasons stated above, Defendant-Appellant respectfully requests that this Honorable Court grant rehearing in

this case.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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

Date: January 27, 1998

AFFIDAVIT


STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

F. MICHAEL SCHUCK, being first sworn, says that he has read the foregoing and it is true to the best of his knowledge and belief.



F. MICHAEL SCHUCK

Subscribed and sworn to before me
January 27, 1998.



BARBARA WASHINGTON
Notary Public, Wayne County, Michigan
My commission expires: 3/7/01

APPENDIX A

RECEIVED

11440 T
C. J. BOOKER

JAN 07 1998 STATE OF MICHIGAN

APPELLATE DEFENDER OFFICE 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.

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 McElhane*y, 215 Mich App 269, 283; 545 NW2d 18 (1996). The prosecution may not suggest to the jury that it decide a case on other than the evidence itself. *People v Bairefoot*, 117 Mich App 225, 231; 323 NW2d 302 (1982). However, the prosecutor here rhetorically asked each jury what hope the complainant or any child would have if the child reported being "hurt" by an adult and then was not believed, suggesting that the complainant would suffer harm if the jury "disbelieved" her account. While we strongly discourage the use of such civic duty arguments, see *People v Farrar*, 36 Mich App 294, 298-299; 193 NW2d 363 (1971), we do not find that manifest injustice will result to this defendant by declining to review this issue further. A timely objection by defense counsel and a curative instruction from the trial court would have eliminated any possible prejudice to defendant because of the prosecutor's inappropriate argument. See *People v Wise*, 134 Mich App 82, 102, 105-106; 351 NW2d 255 (1984).

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

* * *

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

A: Yes, there is.

Q: What was that?

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

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

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

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

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

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

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

[*Complainant*]: Um, after that?

[*Detective Vazquez*]: Yea.

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

[*Detective Vazquez*]: Okay.

* * *

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

[*Detective Vazquez*]: The brother did?

[*Complainant*]: Um-hum.

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

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

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

[*Complainant*]: By my neck.

* * *

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

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

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

[Complainant]: No.

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

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

* * *

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

[Complainant]: Um-hum.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 Rodriguez (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).

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

Court of Appeals No. 173814
Lower Court No. 93-63014-FCB

STEPHEN DENNIS TURNER,

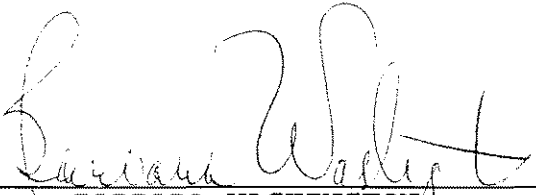
Defendant-Appellant.

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

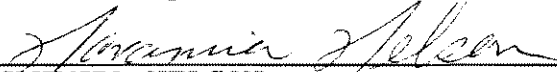
BARBARA WASHINGTON, being first duly sworn, deposes and says that on January 27, 1998, she filed with this Court and mailed one (1) copy of a Notice of Hearing, Motion for Rehearing, Affidavit, and Proof of Service to:

KENT COUNTY PROSECUTOR'S OFFICE
HALL OF JUSTICE
333 MONROE AVENUE, N.W.
GRAND RAPIDS, MI 49503



BARBARA WASHINGTON

Subscribed and sworn to before me
on January 27, 1998.



NAVANIA NELSON
Notary Public, Wayne County, Michigan
My commission expires: 7/17/2001
IDEN NO. 11440T -- C. Joseph Booker