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

July 6, 1998

Mr. Stephen Dennis Turner
235530
Carson City Regional Facility
10522 Boyer Road
P. O. Box 5000
Carson City, MI 48811-5000

Dear Mr. Turner:

Enclosed is a copy of the prosecutor's answer opposing our Application for Leave to Appeal and brief recently filed in your case.

Sincerely,

C. Joseph Booker

C. Joseph Booker
Assistant Defender

kt
Enclosure

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

-vs-

STEPHEN DENNIS TURNER,

Defendant-Appellant.
_____/

Court of Appeals
No. 173814

Circuit Court
No. 93-63014

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

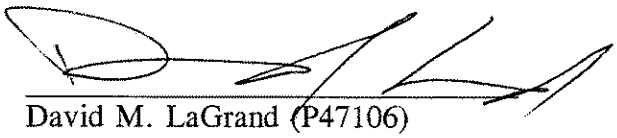
NOW COMES Petitioner-Appellee, the People of the State of Michigan, through the Prosecuting Attorney for the county of Kent, David M. LaGrand, Assistant Prosecutor, and answers in opposition to Respondent-Appellant's (hereafter respondent) application for leave to appeal the following:

1. To the best of Plaintiff's knowledge, Defendant now raises only arguments that were previously addressed in the Court of Appeals. Plaintiff's response to Defendant's arguments have been expressed in Plaintiff's brief in the Court below. That brief is incorporated hereby in Plaintiff's response, and a copy is attached to this response.

WHEREFORE, for the reasons stated above, Petitioner respectfully asks that respondent's application for leave to appeal be DENIED.

Respectfully submitted,
William A. Forsyth
Kent County Prosecuting Attorney

DATED: 6/29/98



David M. LaGrand (P47106)
Assistant Prosecuting Attorney

William A. Forsyth (P23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P25386)
Chief Appellate Attorney

David M. LaGrand (P47106)
Assistant Prosecuting Attorney

Business Address:
416 Hall of Justice
333 Monroe NW
Grand Rapids MI 49503
(616) 774-3577

128

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

-vs-

STEPHEN DENNIS TURNER,

Defendant-Appellant.
_____/

Court of Appeals
Nos. 173814,172928

Circuit Court
No. 93-63014

PLAINTIFF-APPELLEE'S BRIEF
ORAL ARGUMENT REQUESTED

William A. Forsyth (P23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P25386)
Chief Appellate Attorney

David M. LaGrand (P47106)
Assistant Prosecuting Attorney

Business Address:
416 Hall of Justice
333 Monroe NW
Grand Rapids, MI 49503
(616) 774-3577

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES iii

COUNTER-STATEMENT OF QUESTIONS PRESENTED v

COUNTER-STATEMENT OF FACTS 1

I.

THE TRIAL JUDGE DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT ON THE CHARGE OF FIRST DEGREE CSC, NOR WAS THAT VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE. 2

II.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THEY COULD CONVICT DEFENDANT IF HIS ACT OF ASSISTANCE IN THE COMMISSION OF THE CRIME INCLUDED TEMPORARY DELAYING OF THE CRIMES' DETECTION 7

III.

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT IT MUST REACH UNANIMITY AS TO CODEFENDANT'S SPECIFIC CRIMINAL ACT WHERE NO INSTRUCTION WAS REQUESTED AND WHERE THE EVIDENCE REGARDING CODEFENDANT'S CRIMINAL ACTS WAS MATERIALLY SIMILAR. 8

IV.

THE TRIAL COURT DID NOT IMPROPERLY ADMIT EVIDENCE OF RAPE TRAUMA SYNDROME AT TRIAL, AND DEFENDANT DID NOT OBJECT TO THE CONTENTS OF THAT EVIDENCE AT TRIAL. 11

V.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING VICTIM'S STATEMENT TO POLICE OFFICER KARPOWICZ AFTER THE ASSAULT. 13

VI.

THE TRIAL JUDGE DID NOT ERRONEOUSLY INSTRUCT THE JURY THAT DEFENDANT MUST HAVE INTENDED CODEFENDANT TO COMMIT THE CRIME IN QUESTION OR KNOWN THAT CODEFENDANT INTENDED ITS COMMISSION. 15

VII.

THE TRIAL JUDGE DID NOT ERR IN INSTRUCTING THE JURY ON THE ELEMENT OF ASSISTANCE. 17

VIII.

THE PROSECUTOR DID NOT INJECT A CIVIC DUTY ARGUMENT IN HIS CLOSING ARGUMENTS 18

IX.

DEFENDANT'S SENTENCE WAS PROPORTIONAL TO THE OFFENSE AND THE OFFENDER. 19

RELIEF 21

INDEX OF AUTHORITIES

CASES

People v Petrella,424 Mich 221, 268-270; 380 NW2d 11(1985) . . 2

People v Hampton, 407 Mich 534, 285 NW2d 284 (1979) 2

In Re Dana Jenkins, 438 Mich 364 (1991) 20

Jackson v Virginia, 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781 (1979) 2

People of City of Troy v McMaster, 154 Mich App 564 (1986) . 12

People v Biondo 76 Mich App 155, (1977) 18

People v Cooks, 446 Mich 503 (1994) 8,10

People v Deletto, 147 Cal App 3d 458;195 Cal Rptr 233 (1983) . 9

People v Evans, 173 Mich app 631, 636 (1988) 15

People v Goree, 30 Mich App 490 (1971) 5,6

People v Hartford, 159 Mich App 295 (1987) 7

People v Hurt, 211 Mich app 345 (1995) 12

People v Jenness, 5 Mich 305 (1858) 10

People v Lucas, 402 Mich 302 (1978) 7

People v Milbourn, 435 Mich 630, 650; 461 NW2d 1 (1990) . . . 19

People v Paquette,214 Mich App 336(1995) 7,8,15

People v Petrella,424 Mich 221, 268-270; 380 NW2d 11(1985) . . 2

People v Pottruff, 116 Mich App 367 (1982) 10

People v Robinson, 386 Mich 551 (1972) 13

People v Schollaert, 194 Mich App 158,169-70; 486 NW2d 312 (1992) 2

People v Sricklin, 162 Mich App 623, (1987) 13

People v Warner, 190 Mich App 26; 475 NW2d 397 (1991) 19

People v Winkle, 206 Cal App 3d 822; 253 Cal Rptr 726 (1988) . 9

People v Yarger,193 Mich App 532(1992) 10

State v Spigorolo, 21 Conn 359; 556 A2d 112 (1989) 9

OTHER AUTHORITIES

CJI2d 8.1 3,17

STATEMENT OF JURISDICTION

Plaintiff accepts Defendant's statement of jurisdiction

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

DID THE TRIAL JUDGE ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT ON THE CHARGE OF FIRST DEGREE CSC, OR WAS THAT VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

II.

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY THAT THEY COULD CONVICT DEFENDANT IF HIS ACT OF ASSISTANCE IN THE COMMISSION OF THE CRIME INCLUDED TEMPORARY DELAYING OF THE CRIMES' DETECTION?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

III.

DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY THAT IT MUST REACH UNANIMITY AS TO CODEFENDANT'S SPECIFIC CRIMINAL ACT WHERE NO INSTRUCTION WAS REQUESTED AND WHERE THE EVIDENCE REGARDING CODEFENDANT'S CRIMINAL ACTS WAS MATERIALLY SIMILAR?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

IV.

DID THE TRIAL COURT IMPROPERLY ADMIT EVIDENCE OF RAPE TRAUMA SYNDROME AT TRIAL, AND DEFENDANT DID NOT OBJECT TO THE CONTENTS OF THAT EVIDENCE AT TRIAL?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

V.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ADMITTING VICTIM'S STATEMENT TO POLICE OFFICER KARPOWICZ AFTER THE ASSAULT?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

VI.

DID THE TRIAL JUDGE ERRONEOUSLY INSTRUCT THE JURY THAT DEFENDANT MUST HAVE INTENDED CODEFENDANT TO COMMIT THE CRIME IN QUESTION OR KNOWN THAT CODEFENDANT INTENDED ITS COMMISSION?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

VII.

DID THE TRIAL JUDGE ERR IN INSTRUCTING THE JURY ON THE ELEMENT OF ASSISTANCE?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

VIII.

DID THE PROSECUTOR INJECT A CIVIC DUTY ARGUMENT IN HIS CLOSING ARGUMENTS?

Trial court answered "No."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

IX.

WAS DEFENDANT'S SENTENCE PROPORTIONAL TO THE OFFENSE AND THE OFFENDER?

Trial court answered "Yes."

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

COUNTER-STATEMENT OF FACTS

Plaintiff accepts Defendant's recitation of the facts of this case for purposes of appeal. Further facts will be referred to as necessary in the body of the brief.

ARGUMENT

I.

THE TRIAL JUDGE DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT ON THE CHARGE OF FIRST DEGREE CSC, NOR WAS THAT VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

Plaintiff accepts Defendant's statement of the standards of review applicable to these issues.

Defendant claims on appeal that the trial judge erred in denying his motion for a directed verdict on the charge of first degree CSC, and that the jury's verdict convicting Defendant of first degree CSC was contrary to the great weight of the evidence in the case.

Following the introduction of the prosecution's proofs at trial, Defendant moved for a directed verdict in his favor. (TT VII, 737). The trial judge denied Defendant's motion. The appropriate standard to apply in judging the merits of a motion for a directed verdict in favor of the Defendant is whether, viewing the evidence in the light most favorable to the prosecution, the evidence would allow a reasonable person to find guilt proven beyond a reasonable doubt. People v Petrella,424 Mich 221, 268-270; 380 NW2d 11(1985); People v Schollaert, 194 Mich App 158,169-70; 486 NW2d 312 (1992) People v Hampton, 407 Mich 534, 285 NW2d 284 (1979); Jackson v Virginia, 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781 (1979). On appeal, this court should view the record in the light most favorable to the government. People v Hampton, 407 Mich 354, 285 NW2d 284 (1979).

In our case, Defendant was convicted of aiding and abetting

first degree Criminal Sexual Conduct, and it is clear that sufficient evidence was presented at trial to permit a rational trier of fact to convict Defendant of that crime. The Michigan Criminal Jury Instructions detail the elements necessary to prove that a defendant was guilty of aiding and abetting:

> (3) To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (a) First, that the alleged crime was actually committed, either by the defendant or someone else. [It does not matter whether anyone else has been convicted of the crime.]
>
> (b) Second, that before or during the crime, the defendant did something to assist in the commission of the crime.
>
> (c) Third, that when the defendant gave his assistance he intended to help someone else commit the crime.
>
> CJI2d 8.1

Defendant does not argue that the jury could not rationally have found Codefendant, Defendant's brother, guilty of first degree CSC, but argues that the evidence presented at trial did not show sufficient involvement by Defendant in Codefendant's crime to convict Defendant on an aiding and abetting theory.

The evidence presented relative to Defendant's involvement in the CSC showed that Defendant was present in the apartment where Codefendant assaulted Lakeysha. Defendant claimed in his statements to the police that he was not present during Codefendant's assaults on Victim, being in his room when the assaultive acts began, and being out of the apartment when the acts continued and were completed. At trial, however, the following testimony was elicited from Victim on direct examination:

Q. Now, going back to when you're back in the apartment,

think about the man that has the beard now. What did he do when you were inside the apartment?
A. When he had, when the man with the lipstick 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.
(TT I, 56).

If this testimony was believed, the jury could well have concluded that by "feeling on" victim's chest while victim was being pinned to a mattress, Defendant was acting assisting Codefendant in his "feeling on" Victim's private part. The jury could also quite reasonably have concluded that this restraint by Defendant allowed Codefendant the opportunity to commit the other acts of first degree criminal sexual conduct which Victim testified happened later on in a back bedroom. (TT I 49).

Defendant argues on appeal that the prosecutors' only argument for convicting Defendant of aiding and abetting first degree CSC was based on evidence that later in the course of the assaults, Defendant attempted to coerce Victim into not reporting the assaults on her by Defendant and Codefendant. Defendant further argues that the argument was based on erroneous instructions from the trial judge to the jury that delaying a victim from reporting a crime was enough assistance in the crime to constitute aiding and abetting that crime. Plaintiff notes as an initial matter that it is an elementary principle of law that the jury is free to convict a defendant of charged crimes based on the evidence introduced at trial, and is by no way bound in its determinations by the arguments of attorneys on either side of the issue.

It is true that the prosecution argued that Defendant's

actions shortly before Victim left Defendant and Codefendant's apartment constituted aiding and abetting for purposes of the statute. Victim testified that before she was released, Codefendant and Defendant made Victim pose with a knife over Codefendant, apparently took a photograph, and told Victim that if she reported the sexual assaults, Codefendant and Defendant would use the picture to discredit her. It is likewise true that the trial court instructed the jury regarding aiding and abetting and stated that help which included delaying a Victim's reporting could constitute aiding and abetting an assault. Plaintiff argues that this instruction was not in error.

In giving this instruction, the trial court relied on this Court's analysis of the terminal point of a crime in People v Goree, 30 Mich App 490 (1971). In that case, this Court held in the context of an armed robbery that escape ceases to be a continuous part of the original felony when the escaping felon reaches a point of at least temporary safety or is subject to "complete" custody. Id at 495. Plaintiff has discovered no case law directly addressing the question of when an assaultive offence such as first degree Criminal Sexual Conduct is properly determined to be terminated. Plaintiff submits that in this case, analogizing to the situation of commission of an armed robbery, the assaultive crime is being committed as long as the victim is still under the control of his or her assailant, and the victim has not reached a place of at least temporary safety. In that case, any assistance given to the assailant which delays the victim's reaching safety

may properly be viewed as aiding and abetting an assault which is still in the process of being committed. Defendant clearly gave that assistance if Victim's testimony in this case is to be believed: Defendant detained Victim in his apartment, and further coerced Victim into acts designed to allow Defendant and Codefendant to escape the detection of their assaults on Victim. Just as in an armed robbery, an essential element of the offence is escaping with property, so in the case of a sexual assault, an essential aim of the attacker is to evade detection. People v Goree, 30 Mich App 490. In the context of this understanding of Defendant's acts, the Trial Judge's analysis of Defendant's participation as constitution aiding and abetting Codefendant's sexual assault on Victim was not erroneous.

ARGUMENT

II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THEY COULD CONVICT DEFENDANT IF HIS ACT OF ASSISTANCE IN THE COMMISSION OF THE CRIME INCLUDED TEMPORARY DELAYING OF THE CRIMES' DETECTION

Plaintiff accepts Defendant's articulation of the standard of review for this issue.

This issue has largely been addressed in argument I, supra. Plaintiff does not dispute that there is an active distinction between aiding and abetting and acting as an accessory after the fact. People v Lucas, 402 Mich 302 (1978). Defendant is correct that the dividing line between these two sorts of assistants comes in the determination of whether the crime has been completed when the aid is rendered. People v Hartford, 159 Mich App 295 (1987). However, plaintiff maintains that in this case the crime was still in process when Defendant tendered the assistance designed to allow Codefendant to elude detection. The trial court gave the jury its instructions in the context of evidence which only could have proved that Defendant aided Co-defendant during the period in which Victim was held in the Defendant's apartment, and not at some point after the crime was completed. It is in this context that the judge's instructions to the jury must be read. Jury instructions must be read as a whole when reviewed for error, and a failure to object to those instructions at trial waives the issue for review. People v Paquette,214 Mich App 336(1995).

ARGUMENT

III

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT IT MUST REACH UNANIMITY AS TO CODEFENDANT'S SPECIFIC CRIMINAL ACT WHERE NO INSTRUCTION WAS REQUESTED AND WHERE THE EVIDENCE REGARDING CODEFENDANT'S CRIMINAL ACTS WAS MATERIALLY SIMILAR.

Plaintiff accepts Defendant's statement of the standard of review for this issue.

Defendant claims on appeal that although no request for such an instruction was made at trial, Defendant was deprived of a fair trial when the trial judge failed to instruct jurors that they must reach unanimity regarding which specific act of first degree CSC committed by Codefendant formed the basis for convicting Defendant of aiding and abetting first degree CSC.

Jury instructions must be read as a whole when reviewed for error, and a failure to object to those instructions at trial waives the issue for review. People v Paquette,214 Mich App 336(1995). In this case, Defendant made no objections regarding a failure to instruct on unanimity at trial, and the issue is consequently waived.

The Michigan Supreme Court recently addressed the need for instructions regarding jury unanimity on specific acts in People v Cooks, 446 Mich 503 (1994). The Court concluded:

> We are persuaded by the forgoing 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 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.

In reaching this distinction, the Supreme Court relied on federal case law and decisions by Connecticut and California State Courts determining that it was not always necessary to instruct a jury that its verdict be unanimous regarding specific acts forming the basis for conviction. In State v Spigorolo, 21 Conn 359; 556 A2d 112 (1989), the Connecticut Supreme Court held that a specific unanimity instruction was not required where the prosecution presented evidence of six separate incidents of sexual activity committed by a defendant under the theory that the acts constituted a continuous course of conduct. In People v Winkle, 206 Cal App 3d 822; 253 Cal Rptr 726 (1988), the California Court of Appeals recognized a continuous conduct exception to the need for a unanimity instruction, and applied that exception in a case in which a victim claimed to have been sexually assaulted repeatedly at various locations in a home over the course of a number of weeks. Id at 826.

The Michigan Supreme Court also cited for support the analysis of the California Courts in People v Deletto, 147 Cal App 3d 458;195 Cal Rptr 233 (1983). In that case, the victim testified that "(1) defendant made oral contact with her genital area, and (2) defendant placed his penis in her mouth and ejaculated...during the summer of 1980 at the [same] residence[.]" Id at 465. The Court in Deletto concluded that a unanimity instruction was not necessary in that case, stating:

This is not a case in which different witnesses

> testified as to one incident but not the other or where different items of real evidence were introduced to prove one act but not the other, so that the jury might have distinguished between the credibility of different witnesses or the weight to be given various items of real evidence. Id at 468.

In Cooks, 446 Mich 503, the Supreme Court distinguished the facts before it from the circumstances of earlier Michigan cases such as People v Yarger,193 Mich App 532(1992) People v Jenness, 5 Mich 305 (1858) and People v Pottruff, 116 Mich App 367 (1982). In Cooks, victim testified that Defendant had anally penetrated her on three separate occasions in different places in her home and over the course of a number of days. The Supreme Court found that the evidence regarding these acts was substantially identical, as was not the case in Yarger, Jenness, and Pottruff. The Court found that as a consequence of the substantial identity of the testimony, the testimony regarding these acts did not require a specific unanimity instruction. Cooks, 446 Mich at 513.

In the instant case, the only testimony regarding the acts of penetration committed by Codefendant was provided by Victim. The acts both took place within a single day within the context of an abduction of Victim which only lasted a few hours. The jury was presented with no physical evidence of penetration, nor indeed with any evidence which would have tended to prove the commission of one of the acts of penetration but not the other. As a result, the instant case falls squarely in line with the analysis of the Michigan Supreme Court in Cook, and no specific unaminity instruction was required in this case.

ARGUMENT

IV

THE TRIAL COURT DID NOT IMPROPERLY ADMIT EVIDENCE OF RAPE TRAUMA SYNDROME AT TRIAL, AND DEFENDANT DID NOT OBJECT TO THE CONTENTS OF THAT EVIDENCE AT TRIAL.

Plaintiff accepts Defendant's statement of the standard of review for this issue.

Defendant claims on appeal that evidence of rape trauma syndrome should not have been presented to his jury, since Codefendant's attorney rather than his own trial attorney opened the door to testimony regarding evidence of rape trauma syndrome at trial. Defendant does not dispute that the door was opened to the admission of such testimony in the hearing of Defendant's jury. Nor does Defendant dispute that unfavorable inferences regarding Victim's post-incident behavior were first raised by counsel for Codefendant, and that Rape Trauma Syndrome evidence was necessary to rebut those inferences. Rather, Defendant asserts because it was not his trial attorney who specifically raised the adverse behavioral inferences in front of his jury, that evidence was not properly admitted to rebut those same inferences. Defendant cites no authority for this proposition on appeal. As the Trial Judge noted, Defendant's trial attorney asked for severance on this issue, but the differences of opinion amongst counsel as to whether or not to draw adverse inferences from post-incident behavior does not rise to the level of antagonistic defenses warranting severance. (TT). Defendant does

not claim on appeal that severance should have been granted. Accordingly, there is no basis to suppose that evidence of Rape Trauma Syndrome was improperly admitted. People v Hurt, 211 Mich app 345 (1995).

Defendant additionally argues that the evidence given by the expert on Rape Trauma Syndrome was improper. A review of the testimony clearly indicates that the expert was speaking in hypothetical terms when she referred to the reactions of a rape survivor:

> What is known is that there are two main styles of emotional expression following an assault. One is the expected style, which is sobbing and being hysterical. The other is being very controlled and trying to get back to normal.
>
> And so her behavior that was observed in the waiting room is not unusual. That's one expected style of emotional reaction following an assault.
>
> It's 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.
>
> Q. And these two theories you're describing, you have witnessed them through you own work? (TT V,637).

The expert did not in fact testify that she believed an assault had occurred, nor did she testify that Victim acting normally indicated that an assault had occurred. Thus the expert did not exceed the bounds for testimony established in People v Hurt, 211 Mich App 345. Finally, Defendant made no objection to the substance of this testimony at trial. The ordinary of failure to object is preclusion of appellate review. MRE 103(a); People of City of Troy v McMaster, 154 Mich App 564 (1986).

ARGUMENT

V

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING VICTIM'S STATEMENT TO POLICE OFFICER KARPOWICZ AFTER THE ASSAULT.

Plaintiff accepts Defendant's statement of the standard of review for this issue.

Defendant claims on appeal that the Trial Court committed reversible error in allowing admission of testimony of Detective Karpowicz relating the nature of statements made by victim at the Children's Assessment Center. Admittedly this testimony constituted hearsay evidence, and admittedly this Court has not always found the admission of hearsay evidence to be harmless error. However, in the instant case, admission of this testimony was by no means so offensive to the maintenance of a sound judicial process as to be regarded as reversibly harmful. People v Robinson, 386 Mich 551 (1972). In this case, although Victim's statements are not technically admissible under the "tender years" exception on MRE 803(A)(1) since Victim was not under ten years old at the time of the incident; In fact, Victim was ten years and four months of age. Victims' statements to Officer Karpowicz as related at trial were not lengthy, and were duplicative of Victim's own testimony. (TT V, 610). Unlike People v Sricklin, 162 Mich App 623, (1987), in this case there was no testimony presented by the defendant which offered a different version of events, meaning that the credibility of the witness was not called directly into question.

Plaintiff further asserts that the statements to Officer Karpowicz were admissible under MRE 803(4) as pursuant to medical treatment. Victim made these statements at the Children's Assessment Center, a medical facility dedicated to investigating and treating child abuse, and staffed by medical personnel. Officer Karpowicz testified that she immediately related the contents of Victims' statements to Victim's treating physician Dr. Cox.

(TT V 609). Thus, Victim's statements were made in connection with and for the purpose of medical treatment and diagnosis, and dealt with Victim's past medical history. MRE 803(4).

ARGUMENT

VI

THE TRIAL JUDGE DID NOT ERRONEOUSLY INSTRUCT THE JURY THAT DEFENDANT MUST HAVE INTENDED CODEFENDANT TO COMMIT THE CRIME IN QUESTION OR KNOWN THAT CODEFENDANT INTENDED ITS COMMISSION.

Plaintiff accepts Defendant's statement of the standard of review for this issue.

Defendant claims on appeal that the trial judge did not adequately instruct jurors that they must find that Defendant intended Codefendant to assault Victim, or have know that Codefendant intended to assault Victim when Defendant rendered his aid to Codefendant. Plaintiff notes as an initial matter that here again Defendant failed to object to the jury instructions at the time of trial. Jury instructions must be read as a whole when reviewed for error, and a failure to object to those instructions at trial waives the issue for review. People v Paquette,214 Mich App 336(1995).

Defendant argues that the critical assessment of intent requires the jury to find one of two levels of intent on the part of the aider and abettor of a crime: "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." People v Evans, 173 Mich app 631, 636 (1988). In this case, the trial judge instructed the jury:

> 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 Tuner 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. (TT VII, 833).

Thus, the trial judge in fact gave an instruction regarding intent which was too generous to Defendant; the trial judge told the jury that Defendant had to intend Codefendant's commission of the crime, and that mere knowledge of Codefendant's intent would not satisfy the requirements for a conviction of aiding and abetting. Defendant claims on appeal that somehow the judge should have instructed the jury that Defendant needed knowledge of Codefendant's intent, but this is not the law. Such a finding would indeed warrant a conviction for aiding and abetting, but this is a lesser level of intent than is involved in Defendant's actually intending the commission of the crime himself. It was this second higher level of intent which alone the trial judge informed the jury was required for a conviction of Defendant on an aiding and abetting theory. Raising the standard of proof in this case cannot have been harmful to Defendant, since intent that Codefendant commit the assault and intent to help Codefendant commit the assault necessarily encompass the lesser volitional state of merely Knowing Codefendant intended an assault at the time that Defendant gave deliberate aid.

ARGUMENT

VII

THE TRIAL JUDGE DID NOT ERR IN INSTRUCTING THE JURY ON THE ELEMENT OF ASSISTANCE.

Plaintiff accepts Defendant's articulation of the standard of review for this issue.

The 2nd Edition of the Michigan Criminal Jury instructions has this to offer as an instruction on the concept of inducement:

> It does not matter how much help, advice, or encouragement the defendant gave. However, you must decide whether the defendant intended to help another commit the crime and whether his help, advice, or encouragement actually did help, advise or encourage the crime.
> CJI2d 8.4

The trial judge offered the following instruction:

> If you meant for it to be assistance, if it was of assistance and if the person committed a crime with that help, even though it wasn't much help, as long as it was affirmative and real, then the crime of aiding and abetting has indeed occurred, and it's aiding and abetting whatever offense you find that the principal, the other person, actually did.
>
> So if you're satisfied that Daniel Turner committed one of the two offenses that I've talked about, an that his brother helped him, intending to help him, then you may find him guilty of aiding and abetting whatever offence your satisfied Daniel committed. (TT VII 834).

Plaintiff is at a loss to see how the trial judge's instruction failed to encompass the key elements of the concept inducement as laid out in the standard jury instructions. The trial judge did not use the magic word :"inducement" to be sure, but then neither do the standard instructions. Plaintiff notes that here, as before no objection to the instructions was made at trial, the natural consequence of which is preclusion of appellate review.

ARGUMENT

VIII

THE PROSECUTOR DID NOT INJECT A CIVIC DUTY ARGUMENT IN HIS CLOSING ARGUMENTS

Plaintiff accepts Defendant's statement of the standard of review applicable to this issue.

In his closing argument, the prosecutor argued:

> Look, Lakeysha Cage has come in here after describing this incident to a number of people and has described it to you , and defence counsel would have you believe, "Geez, in that limited role, if she's talking about my client, she's lying."...What hope does Lakeysha Cage or any child have when she tell someone "This adult hurt me," and we don't believe 'em? (TT VII 878).

This argument was merely a plea to the jury to believe Victim. Since the prosecutor's case depended on Victim's testimony, it is logical that the prosecutor would have the jury believe that testimony. While admittedly the prosecutor need not have referred to a need to believe other children than Victim when those children are truthful, this hardly raises his exhortation that the jury believe victim to the level of a civic duty argument. A plea to believe Victim does not constitute the interjection of issues unrelated to the case. People v Biondo 76 Mich App 155, (1977).

ARGUMENT

IX.

DEFENDANT'S SENTENCE WAS PROPORTIONAL TO THE OFFENSE AND THE OFFENDER.

Plaintiff accepts Defendant's articulation of the standard of review for this issue.

Defendant's 15 to 30 year sentence was proportionate to the offence and the offender, in keeping with the mandate of People v Milbourn, 435 Mich 630, 650; 461 NW2d 1 (1990). When a court imposes a sentence, the court must respect the "principle of proportionality." Id. This means that in imposing a sentence, a court must "take into account the nature of the offense and the background of the offender." Milbourn 435 Mich at 651.

Sentences which fall within the range recommended in the Michigan Sentencing Guidelines are presumptively proportionate. People v Warner, 190 Mich App 26; 475 NW2d 397 (1991). At sentencing, the trial judge explicitly noted the Sentencing Information Report scoring of Defendant's crime prepared in conjunction with Defendant's Presentence Investigation Report. That scoring produced a recommended range for Defendant's minimum sentence between 60 and 120 months. As the trial judge noted at sentencing, however, the scoring of the guidelines did not take note of the fact that Defendant was involved in the same crime as a Co-defendant who received a much higher sentence. (ST 39-40). In response to this reality and in light of the "egregious" nature of Defendant's crime (Departure Evaluation Form, cited in Defendant's brief at 60), the court departed from the guidelines and sentenced

Defendant to a minimum term of 15 years.

Defendant claims on appeal that pursuant to In Re Dana Jenkins, 438 Mich 364 (1991), the trial court was not permitted to take into account a codefendant's sentence when sentencing a defendant. However, Defendant can cite no language for that proposition, and with good reason. The Supreme Court in Dana Jenkins held not that the court was not permitted to consider a codefendant's sentence, but rather that the court was not required to do so. Id at 376. Accordingly, the trial court committed no error in imposing a sentence proportional to the offender but also to the offence in this case.

RELIEF

WHEREFORE, for the reasons stated herein, the People respectfully pray that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

William A. Forsyth
Kent County Prosecuting Attorney

DATED: June 14/96

David M. LaGrand (P47106)
Assistant Prosecuting Attorney

A P P E N D I X C

Affidavit Explaining Delay

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

AFFIDAVIT EXPLAINING DELAY

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

C. JOSEPH BOOKER, being first sworn, deposes says as follows:

1) I am the appellate attorney within the State Appellate Defender Office assigned to handle Defendant's appeal in the above-entitled cause.

2) The delay in filing the attached application for leave to appeal was not due to Defendant's culpable negligence but was caused by the press of appellate counsel's other work.

3) The delay in filing the within application was occasioned by changes in the policies of the Court of Appeals which have greatly reduced the amount of time available to properly prepare briefs on appeal in that Court. These changes have been especially burdensome in light of the extremely serious nature of the cases handled by appellate counsel. Appellate counsel has made every effort to file the within application at the earliest possible date.

4) This application is being filed within the 56-day deadline provided for in MCR 7.302(C)(3).

FURTHER, deponent sayeth not.

C. Joseph Booker
C. JOSEPH BOOKER

Subscribed and sworn to before me
May 13, 1998.

Virginia M. Melosky
VIRGINIA M. MELOSKY
Notary Public, Wayne County, Michigan
My commission expires: January 18, 2000

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

/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

VIRGINIA M. MELOSKY, being first sworn, says that on May 13, 1998, she mailed one copy of:

NOTICE OF HEARING
DELAYED APPLICATION FOR LEAVE TO APPEAL
PROOF OF SERVICE

TO:

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

CLERK
Kent County Circuit Court
Hall of Justice
333 Monroe Avenue, N.W.
Grand Rapids, MI 49503

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

Virginia M. Melosky
VIRGINIA M. MELOSKY

Subscribed and sworn to before me
May 13, 1998.

Stephanie M. Fletcher

Notary Public, Wayne County, Michigan
My commission expires: 10-30-01
IDEN NO. 11440T
C. Joseph Booker